

2019 Intensive Parent Defender Training
March 6-7, 2019 / Chapel Hill, NC

ELECTRONIC PROGRAM MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.



INTENSIVE PARENT DEFENDER TRAINING

March 6-7, 2019 / Chapel Hill, NC

*Cosponsored by the UNC-Chapel Hill School of Government
& the NC Office of Indigent Defense Services*

AGENDA

Wednesday, March 6

- | | |
|-------------------|---|
| 8:30 to 8:45 am | Welcome and Program Overview |
| 8:45 to 10:15 am | An Overview of Abuse, Neglect, and Dependency [90 min] Proceedings
<i>Sara DePasquale, Assistant Professor of Public Law and Government
UNC School of Government, Chapel Hill, NC</i> |
| 10:15 to 10:30 am | Break |
| 10:30 to 11:00 am | From Report to Petition [30 min]
<i>Gail Carelli, Assistant Attorney General, Public Health & Child Welfare, N.C. Department of Justice, Raleigh, NC</i> |
| 11:00 to 12:00 pm | The Attorney Client Relationship (Ethics) [60 min]
<i>Lyana Hunter, Assistant Public Defender
Office of Public Defender, Wilmington, NC</i> |
| 12:00 to 1:00 pm | Lunch (<i>provided in building</i>)* |
| 1:00 to 2:00 pm | Client Interviewing [60 min]
<i>Wendy Sotolongo, Parent Defender
Annick Lenoir-Peek, Deputy Parent Defender
Office of Indigent Defense Services, Durham, NC</i> |
| 2:00 to 3:00 pm | Evaluating and Challenging Pleadings [60 min]
<i>Annick Lenoir-Peek, Deputy Parent Defender
Office of Indigent Defense Services, Durham, NC</i> |
| 3:00 to 3:15 pm | Break (<i>light snack provided</i>) |
| 3:15 to 3:45 pm | Using Genres to Develop a Theory [30 min]
<i>Wendy Sotolongo, Parent Defender
Office of Indigent Defense Services, Durham, NC</i> |
| 3:45 to 4:45 pm | Discovery and Motions in A/N/D Proceedings [60 min]
<i>Allyson Shroyer, Attorney
Ziomek & Shroyer, PLLC, Rutherfordton, NC</i> |

*IDS employees may not claim reimbursement for lunch



Thursday, March 7

8:30 to 9:30 am	Evidence Issues [60 min] <i>John Rubin, Professor of Public Law and Government</i> UNC School of Government, Chapel Hill, NC
9:30 to 9:45 am	Break
9:45 to 11:15 am	WORKSHOP: Adjudication Preparation [90 min]
11:15 am to 12:30 pm	Promoting Client’s Objectives: Strategizing Disposition [75 min] <i>Dorothy Hairston Mitchell, Clinical Assistant Professor</i> <i>Supervising Attorney, Juvenile Law Clinic</i> NC Central University School of Law, Durham, NC
12:30 to 1:15 pm	Lunch (<i>provided in building</i>)*
1:15 to 2:15 pm	Review and Permanency Planning Hearings [60 min] <i>Dorothy Hairston Mitchell, Clinical Assistant Professor</i> <i>Supervising Attorney, Juvenile Law Clinic</i> NC Central University School of Law, Durham, NC
2:15 to 3:30 pm	Direct and Cross Examination [75 min] <i>Seth Blum, Attorney, Kurtz & Blum, PLLC, Raleigh, NC</i>
3:30 to 3:45 pm	Break (<i>light snacks provided</i>)
3:45 to 4:30 pm	Appeals [45 min] <i>Annick Lenoir-Peek, Deputy Parent Defender</i> Office of Parent Representation, Durham, NC <i>Panel: Rick Croutharmel, Attorney, Raleigh, NC</i> <i>Leslie Rawls, Attorney, Charlotte, NC</i> <i>Mark Hayes, Attorney, Durham, NC</i>
4:30 pm	Adjourn

CLE HOURS	
General Hour(s):	11.75
Ethics Hour(s):	1.0
Total CLE Hours:	12.75

CLE Pending Approval

*IDS employees may not claim reimbursement for lunch

FROM REPORT TO PETITION

Behind the Scenes at DSS
The Activities Leading Up to Filing a Petition

Gail Carelli
Child Welfare Attorney
Attorney General Office

LAW AND JUSTICE



The Report
(G.S. 7B-301, 7B-309)

- ✓ Everyone in North Carolina is a mandated reporter
- ✓ Reports can be anonymous
- ✓ Reports made in good faith provide immunity
- ✓ Reports made to the County DSS where the juvenile resides or is found.



The Report
(DHHS/DSS Family Services Policy Manual)

- ✓ All reports to DSS are either screened in or screened out.
- ✓ Screening decision is made by the intake social worker and a supervisor
- ✓ Allegations screened in only when, if true, they meet the definition of abuse, neglect, or dependency

Assessment (G.S. 7B-302)

• Family Assessment

- A family-centered approach to assessment that allows more flexibility in terms of initiation, interviews with child and family, and other aspects.

• Investigative Assessment

- A more traditional investigation, required in certain cases, and follows a more rigid protocol

The DSS Assessment Tools (DHHS/DSS Family Services Policy Manual)

- ✓The N.C. Risk Assessment (DSS-5230)
- ✓Assessment of Strengths and Needs (DSS 5229)
- ✓The N.C. Safety Assessment (DSS-5231)



5

Obtaining Necessary Information (G.S. 7B-302(e))

- Director may consult with any public or private agencies or individuals, who shall assist in assessment
- Director may make a written demand for information that is relevant, in director's opinion (even confidential)
- Public or private agency or individual shall provide access and copies



Obstruction/Interference Petition (G.S. 7B-303; AOC-J-120)

- ✓ Refusing to disclose the whereabouts of the juvenile
- ✓ Refusing to allow the director to have personal access to the juvenile
- ✓ Refusing to allow the director to interview juvenile in private
- ✓ Refusing to allow the director access to confidential information
- ✓ Refusing to allow the director to arrange for an evaluation
- ✓ Other conduct that makes assessment impossible

Who drafts/files the Petition?

- The Director, which includes the Director's authorized representative (ie: the social worker)
- Who actually drafts it depends on the structure of the legal department in any given county
 - Staff attorney, contract attorney, county attorney
 - Some are available after hours, some are not
 - Some attorneys draft petitions, some do not
- Statutory exemption to the unauthorized practice of law that allows Directors or their authorized representatives to draft and file petitions.

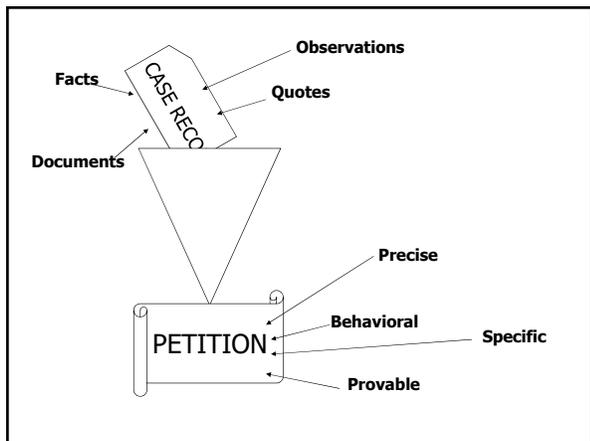
Filing a Petition

- Without Nonsecure Custody – G.S. 7B-302(c)
- ... "If the parent, guardian custodian, or caretaker refuses to accept the protective services provided or arranged by the director, the director *shall* sign a petition seeking to invoke the jurisdiction of the court for the protection of the juvenile..."
- With Nonsecure Custody - G.S. 7B-302(d), 7B-503 & 7B-505
- Reasonable Factual Basis to believe the matters alleged are true
- One of six grounds for NSC exists

Grounds for Nonsecure Custody (G.S. 7B-503)

1. Juvenile has been abandoned
2. Juvenile has suffered physical injury or sexual abuse
3. Juvenile exposed to substantial risk of physical or sexual abuse & parent has created the conditions likely to cause injury
4. Juvenile in need of medical treatment & parent will not provide it
5. Parent consents
6. Juvenile is a runaway and consents

*And possibly, emotional abuse (CIP Bill)



ELEMENTS OF A PETITION

- Identifying Information
- Plain & Concise Allegations of Fact
 - Neglect, Abuse, Dependency (harm, severity, & risk)
 - Connection to Parental Behavior
- Willingness and/or Ability to Protect
- Refusal of Services
- Reasonable Efforts

Forms

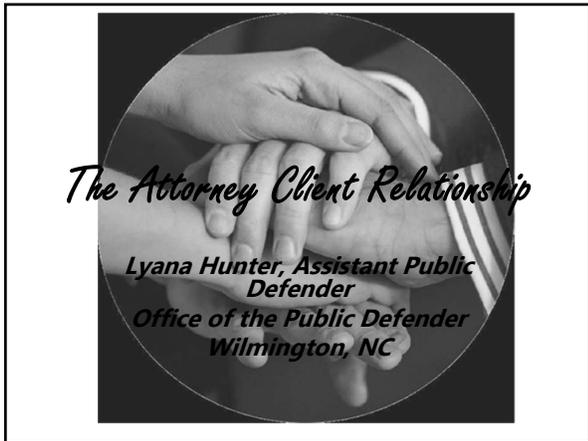


- Petition (AOC-J-130)
 - Nonsecure Custody Order (AOC-J-150)
 - Summons and Notice of Hearing (AOC-J-142)
 - Affidavit as to Status of Minor Child (AOC-CV-609)
 - SMCR Affidavit (AOC-G-250)
- Service of Process must be according to Rule 4(j). See G.S. 7B-407

Contact Information

- Gail Carelli
- (919) 716-6440
- gcarelli@ncdoj.gov

THE ATTORNEY CLIENT RELATIONSHIP



OVERVIEW

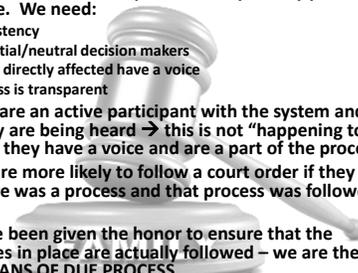
- Importance of establishing a relationship with your client
- Elements of building a positive relationship with your client
- How to build a relationship with your client

Importance of Establishing Relationship with client

- Protects Due Process
- Ensures parents are treated with respect
- Gives parents a voice
- Better outcomes for clients
- Procedural justice

Procedural Justice

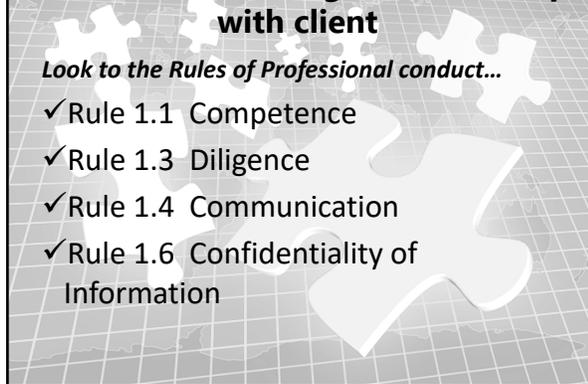
- Fair procedures → more positive reception by parties of outcome. We need:
 - Consistency
 - Impartial/neutral decision makers
 - Those directly affected have a voice
 - Process is transparent
- Parents are an active participant with the system and feel they are being heard → this is not “happening to them” – they have a voice and are a part of the process
- Parent are more likely to follow a court order if they feel like there was a process and that process was followed fairly
- We have been given the honor to ensure that the processes in place are actually followed – we are the GUARDIANS OF DUE PROCESS



Elements of Building a Relationship with client

Look to the Rules of Professional conduct...

- ✓ Rule 1.1 Competence
- ✓ Rule 1.3 Diligence
- ✓ Rule 1.4 Communication
- ✓ Rule 1.6 Confidentiality of Information



Rule 1.1 Competence

- A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Legal Knowledge and Skill

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.



Rule 1.1 Competence (cont.)

• *Thoroughness and Preparation*

[5] Competent handling of a particular matter includes inquiry into, and analysis of, the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined, in part, by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity or consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible.

Rule 1.1 Competence (cont.)

• *Maintaining Competence*

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

2014 Formal Ethics Opinion 5. Opinion rules a lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

Rule 1.3 Diligence

- A lawyer shall act with reasonable diligence and promptness in representing a client.

- *Comments:*

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued...

- [3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions.

Rule 1.4 Communication

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.4 Communication (cont.)

Withholding Information

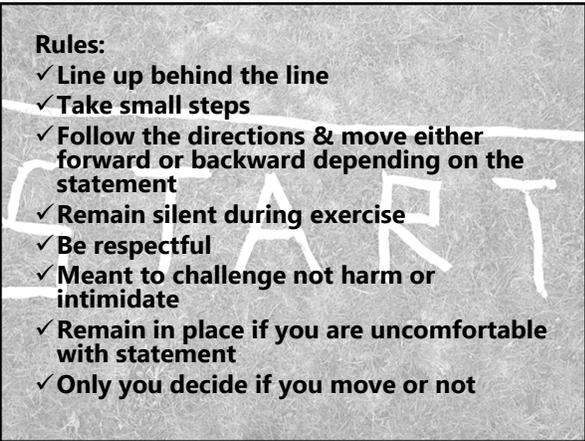
[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Understanding potential barriers

- Poor
- Mostly women
- Kids are gone
- Confused
- Scared
- Angry
- Under the influence of drugs
- Mentally ill
- Mean
- distrustful

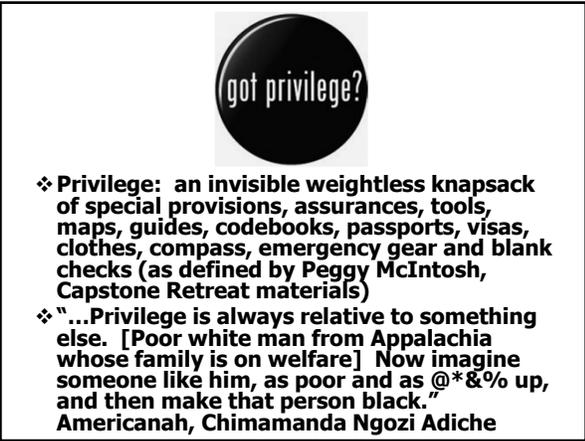
Rules:

- ✓ Line up behind the line
- ✓ Take small steps
- ✓ Follow the directions & move either forward or backward depending on the statement
- ✓ Remain silent during exercise
- ✓ Be respectful
- ✓ Meant to challenge not harm or intimidate
- ✓ Remain in place if you are uncomfortable with statement
- ✓ Only you decide if you move or not





- ❖ **Privilege:** an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear and blank checks (as defined by Peggy McIntosh, Capstone Retreat materials)
- ❖ "...Privilege is always relative to something else. [Poor white man from Appalachia whose family is on welfare] Now imagine someone like him, as poor and as @*% up, and then make that person black."
Americanah, Chimamanda Ngozi Adiche



- Gut reaction – how do you feel about where you are
- Did you find some statements more difficult to answer or understand
- Surprised at where you are
- How did it feel to take steps forward...backwards
- How does it feel to be in the back... front
- Front people → feel privileged?
- Back people → feel underprivileged

- ❖ *Think of a client you know well*
 - ❖ *Would they be in a different position than you were*
- ❖ *What effect can understanding where you are affect your relationship with client*
- ❖ *What kind of emotions/feelings do you experience when working with client*
 - ❖ *Joy, pride, excitement, happiness*
 - ❖ *Frustration, annoyance, anger, FRUSTRATION*
- ❖ *Privilege from our client's perspective*
 - ❖ *We're all privileged, rich lawyers...at least according to our client*

- ## The Point
- How do you relate to clients?
 - What do you do to break the ice
 - Do you discuss race, awkward topics...how?
 - This is not to create excuses → understand differences
 - Race, class, gender does matter; it's just not ALL that matters
 - Common ground can be found in many different ways
 - Who felt like they were privileged before the game?
 - What about now?
 - Need a connection, need client buy-in → the relationship!

References

- “Building better relationships with clients” – Whitney Fairbanks, SOG Parent training 2011
- Portland State University, Capstone Retreat, 9/19/01
- Consult North Carolina Rules of Professional Conduct – <http://www.ncbar.gov/menu/ethics.asp>
- Contact NC Bar Ethics/Professional Responsibility – (919) 828-4620

Lyana Hunter, 910-343-5423, lyana.g.hunter@ncocourts.org

EVALUATING AND CHALLENGING PLEADINGS

EVALUATING AND CHALLENGING PLEADINGS

Annick Lenoir-Peek
Deputy Parent Defender



I DON'T WANT THIS TO HAPPEN!



WHAT OUR CLIENTS HEAR:



YOU GET A CALL ABOUT A NEW CASE:



LET'S GIVE YOU A NEW PLAN!



READING THE PETITION



JURISDICTION

- ▶ § 7B-402 Requirements
- ▶ Chapter 50 (UCCJEA) Requirements
- ▶ Verification
- ▶ § 7B-401.1 Identification of Parties

THE PETITION



1. Who
2. What
3. Where
4. When
5. Why
6. How

ABUSE





1. Who
2. What
3. Where
4. When
5. Why
6. How

NEGLECT





1. Who
2. What
3. Where
4. When
5. Why
6. How

DEPENDENCY





SHOULD YOU FILE A MOTION?



AMENDING THE PETITION



CAN YOU DO THIS?



YOUR TAKE AWAY:

► <https://www.facebook.com/VT/videos/736383796534306/>



I HOPE WE'RE STILL FRIENDS!

ANNICK LENOIR-PEEK

Annick.Lenoir-Peek@nccourts.org
(919) 354-7230



Checklist 1

Nonsecure Custody Orders

“Nonsecure custody” is a North Carolina specific term for a temporary emergency custody order that removes a child from his or her home before the court holds the adjudicatory hearing that determines whether the child is abused, neglected, and/or dependent. Nonsecure custody is not appropriate in every case but is available when certain statutory criteria exist that show a nonsecure custody order is necessary to protect the juvenile. Although the initial order for nonsecure custody may be entered ex parte when the notice provisions of G.S. 7B-502 do not apply, subsequent hearings on the need for continued nonsecure custody (as specified in G.S. 7B-506) are required.

AOC Form Orders:

AOC-J-150, [Order for Nonsecure Custody](#) (Oct. 2017).

AOC-J-151, [Order on Need for Continued Nonsecure Custody](#) (Oct. 2017).

Initial Nonsecure Custody Order and Subject Matter Jurisdiction

- A court action has been commenced by the filing of a verified petition alleging abuse, neglect, or dependency in district court by a county department with standing. The petition was
 - filed with clerk’s office during hours when court was open.
 - accepted by magistrate when the clerk’s office was closed as authorized by G.S. 7B-404. G.S. 7B-101(10); 7B-302(c), (d); 7B-400; 7B-401.1(a); 7B-402; 7B-404; 7B-405.
- The petition is properly signed by the department’s director or authorized representative. G.S. 7B-101(10); 7B-302(c), (d); 7B-403(a).
- The petition is properly verified. G.S. 7B-403(a).
- The petition requests relief. N.C.R.Civ.P. 7(b)(1).
- NC has jurisdiction under the UCCJEA pursuant to G.S. Chapter 50A (review the allegations in the petition or attached affidavit addressing criteria specified by G.S. 50A-209 regarding the child’s status) (G.S. 7B-402(b)).
 - This is an initial child custody determination (G.S. 50A-201).
 - NC entered a child custody order prior to this action and NC has exclusive continuing jurisdiction (G.S. 50A-202).
 - NC has temporary emergency jurisdiction (G.S. 50A-204).
 - Another state has entered a child custody order but NC has jurisdiction to modify that order (G.S. 50A-203).
 - The child, the parents, and any person acting as a parent do not presently reside in the other state, or
 - The other state’s court has relinquished jurisdiction to NC and there is a court order from that other state relinquishing jurisdiction.

Compliance with Federal Laws

- Servicemembers Civil Relief Act: 50 U.S.C. 3931–3932*
Before a judgment for petitioner (DSS) is entered,
 - Each respondent has made an appearance in the case. No SCRA affidavit is required.
 - For each respondent who has not made an appearance, there is an affidavit or allegation in the verified petition that addresses that respondent’s military status.
 - It appears that a respondent is in military service. When that respondent has not made an appearance, appoint an attorney to perform SCRA responsibilities.
 - A respondent is in military service. When the criteria of 50 U.S.C. 3931(d), (f) or 50 U.S.C. 3932 is met, a stay of at least ninety days is required.

- Indian Child Welfare Act: 25 C.F.R. 23.107*
Mandatory inquiry as to child’s status as “Indian child” (defined at 25 U.S.C. 1903(4)) must be made of all participants at the commencement of the proceeding, with responses on the record.
 - The child is an Indian child. ICWA provisions apply.
Note: If child resides or is domiciled on Indian land or is a ward of tribal court, tribal court has exclusive jurisdiction unless an exception applies. Provisions of “emergency proceeding” under ICWA must be followed.
 - A participant has “reason to know” the child is an Indian child. Follow ICWA provisions unless and until court determines on the record that the child does not meet the definition of Indian child. Confirm that DSS or other party used due diligence to identify and work with all the tribes child may be member (or eligible for membership of).
 - The child is not an Indian child and no participant has reason to know the child is an Indian child. Instruct the parties to inform the court if they later receive information that provides reason to know the child is an Indian child. ICWA does not apply.

Required Determinations for all Nonsecure Custody Orders: G.S. 7B-503(a)

- There is a reasonable factual basis to believe that the matters alleged in the petition are true.
- One or more of the conditions in G.S. 7B-503(a) exist (see statute for exact language):
 - abandonment;
 - physically injury or sexual abuse;
 - exposed to substantial risk of physical injury or sexual abuse because of conditions created by parent, guardian, custodian, or caretaker;
 - need for medical treatment to prevent serious physical harm that may result in death, disfigurement, or substantial impairment of bodily functions and parent, guardian, custodian, or caretaker is unwilling or unable to consent to treatment;
 - consent by parent, guardian, custodian, or caretaker; or
 - child is a runaway and consents.
- There is a reasonable basis to believe that there are no other reasonable means available to protect the juvenile.

All three criteria must be satisfied.

Note: For continued nonsecure custody, G.S. 7B-506(b) sets forth that

- DSS has the burden of proving by clear and convincing evidence that the juvenile's continued placement in nonsecure custody is necessary; and
- the court is not bound by usual rules of evidence but must receive testimony and allow parties to introduce evidence and cross-examine witnesses.

Initial Nonsecure Custody and Execution of the Order

- Order authorizes law enforcement officer or other authorized person to take physical custody of the juvenile; leave copy of order with child's parent, guardian, custodian, or caretaker; and make due return of the order (G.S. 7B-502).
Additionally, the court may determine
 - Based on the petition and request for nonsecure custody or petitioner's testimony that less intrusive remedy is not available, the law enforcement officer is authorized to enter private property to take physical custody of the juvenile.
 - There are exigent circumstances authorizing law enforcement officer to make forcible entry at any hour.
- The order may authorize the DSS director to consent to a Child Medical Evaluation (CME) if there are written findings demonstrating the director's compelling interest in having the CME before the first hearing on the need for continued nonsecure custody (G.S. 7B-505.1(b)).

Continued Nonsecure Custody Preliminary Issues

- The parties have been properly served or waived service (G.S. 7B-406; 7B-407; 7B-200(b)).
- Venue is proper, or venue is transferred pursuant to G.S. 7B-400.
- Will one of the hearings on the need for continued nonsecure custody be combined with a pre-adjudication hearing? G.S. 7B-800.1(b), see Checklist 2.

Representation (G.S. 7B-601; 7B-602):

- Parent's provisional counsel is
 - confirmed.
 - dismissed.
- Does an unrepresented parent desire and is he or she eligible for appointed counsel (may be reconsidered at any stage in the proceeding)? If yes, appoint counsel.
- If the parent wants to waive the right to counsel, has the court examined him or her on the record and made findings to show that the waiver is knowing and voluntary?
- Parent is under age 18 and not emancipated. A Rule 17 GAL is appointed.
- There is a substantial question as to parent's competency and need for a Rule 17 GAL. A hearing on that issue is required.
- Abuse and/or neglect is alleged. A GAL and attorney advocate has been appointed for the juvenile.
- Only dependency is alleged. The court exercises its discretion to appoint a G.S. 7B-601 GAL and attorney advocate.

Continued Nonsecure Custody Inquiries and Findings

At each hearing on the need for continued nonsecure custody, the court must determine the following (G.S. 7B-506):

- Is paternity at issue? If so, what efforts have been made to establish paternity? Order must include findings and may provide for specific efforts to be taken.
- If a parent is missing, what is known about the identity and location of that parent, and what efforts have been undertaken to locate and serve that parent? Order must include findings and may provide for specific efforts to be taken.
- What efforts have been made by DSS to identify and notify the child's relatives for potential resources for placement or support of the juvenile?
- Are there other juveniles remaining in the home? If so, what are DSS's assessment findings relating to those children? What if any actions has DSS taken and/or what services has DSS provided to protect those children?

Additional findings when a child is placed or remains in nonsecure custody with DSS (G.S. 7B-507):

- Whether continuation in or return to the child's own home would be contrary to the child's health and safety.
- Whether reasonable efforts have been made to prevent the need for placement (child's health and safety are the paramount concern) (finding may be that reasonable efforts were precluded by an immediate threat of harm to the child).
- A statement that the child's placement and care are the responsibility of DSS.

Required placement considerations (G.S. 7B-505(b), (d)):

- In making its order, the court must consider whether it is in the child's best interests to remain in his/her community of residence.
 - Under Fostering Connections and the Every Student Succeeds Act (ESSA), is DSS considering the proximity of the placement to the child's school? Is the child remaining in his or her school based on a best interest determination made by DSS in consultation with others?
- Is a relative willing and able to provide care and supervision in a safe home? If so, placement must be ordered to that relative unless the court finds it is contrary to the child's best interests.
- Have reasonable efforts been made to place the siblings together absent DSS documentation that joint placement is contrary to the safety or well-being of any of the siblings (42 U.S.C. 471(a)(31))?
- Does the placement comply with the Interstate Compact on the Placement of Children (ICPC)?
- Does the placement comply with the Multiethnic Placement Act (MEPA-IEP)?
- When ICWA applies, does the placement comply with ICWA placement preferences?

Additional inquiries the court may make to address the following issues as appropriate:

- Has a petition been filed pursuant to G.S. 7B-303(d1) (caregiver with history of violence when abuse of child alleged)? If so, what are the results of any resulting mental health evaluation (G.S. 7B-507(c1))?
- Does the order need to address consent for medical care for the child that is not routine or emergency care, including a CME? If so, provisions of G.S. 7B-505.1 apply.
- Is the child a member of a state-recognized tribe? If so, the court may order DSS to notify the state-recognized tribe of the need for nonsecure custody for the purposes of locating relatives or nonrelative kin for placement (G.S. 7B-505(c)).
- Financial support.

Outcomes

- Return child (the court must first consider the child's release to his or her parent, relative, guardian, custodian, or other responsible adult (G.S. 7B-503(a)).
- Continue nonsecure custody
 - Placement in nonsecure custody with (G.S. 7B-505(a))
 - DSS (the order must specify that placement and care are DSS responsibility and DSS must provide or arrange for the juvenile's placement unless the court orders a specific placement, G.S. 7B-507(a)(4)) or
 - a person designated in the order (after considering DSS recommendations, G.S. 7B-507(a)(4)).
 - Temporary residential placement may be in any of the following (G.S. 7B-505(a)):
 - the home of parent, relative, nonrelative kin, other person with legal custody of the child's sibling, or any home or facility approved by the court and designated in the order (see also G.S. 7B-505(b), (c));
 - a licensed foster home or home otherwise authorized by law to provide such care; or
 - a facility operated by DSS.
 - Order DSS to make diligent efforts to notify relatives and other persons with legal custody of the child's sibling that the child is in nonsecure custody, unless there is a finding that notification would be contrary to the child's best interests (G.S. 7B-505(b)).
 - Order visitation when custody is removed from a parent, guardian, or custodian or continues the child's placement outside of the home pursuant to G.S. 7B-905.1 (G.S. 7B-506.1(g1)).

Note: When siblings who have been removed from their home are not jointly placed, reasonable efforts for visitation or other ongoing interaction between the siblings should be made absent DSS documentation that it would be contrary to the safety or well-being of any sibling (42 U.S.C. 671(a)(31)).
 - May order services or other efforts aimed at returning the child to a safe home (G.S. 7B-507(a)(5)).
- Set next hearing date in compliance with time requirements of G.S. 7B-506(a).

Note: The court may not dismiss the petition or award permanent custody to a parent or other person without an adjudication on the merits.

Checklist 2

Pre-Adjudication

The court is required to consider criteria set forth in G.S. 7B-800.1 before the adjudicatory hearing. The pre-adjudicatory hearing may be combined with a hearing on the need for continued nonsecure custody or any pretrial hearing authorized by local rules. If nonsecure custody was not requested or granted, this is likely to be the first hearing in the action.

Subject Matter Jurisdiction

- A court action has been commenced by the filing of a verified petition alleging abuse, neglect, or dependency in district court by a county department with standing. The petition was
 - filed with clerk's office during hours when court was open.
 - accepted by magistrate when the clerk's office was closed as authorized by G.S. 7B-404.G.S. 7B-101(10); 7B-302(c), (d); 7B-400; 7B-401.1(a); 7B-402; 7B-404; 7B-405.
- The petition is properly signed by the department's director or authorized representative. G.S. 7B-101(10); 7B-302(c), (d); 7B-403(a).
- The petition is properly verified. G.S. 7B-403(a); 7B-800.1(a)(5a).
- The petition requests relief. N.C.R.Civ.P. 7(b)(1).
- NC has jurisdiction under the UCCJEA pursuant to G.S. Chapter 50A (review the allegations in the petition or attached affidavit addressing criteria specified by G.S. 50A-209 regarding the child's status) (G.S. 7B-402(b)).
 - This is an initial child custody determination (G.S. 50A-201).
 - NC entered a child custody order prior to this action and NC has exclusive continuing jurisdiction (G.S. 50A-202).
 - NC has temporary emergency jurisdiction (G.S. 50A-204) (*Note: The court's authority is limited to entering temporary custody orders when it is exercising temporary emergency jurisdiction, impacting the court's authority to proceed to adjudication*).
 - Another state has entered a child custody order but NC has jurisdiction to modify that order (G.S. 50A-203).
 - The child, the child's parents, and any person acting as a parent do not presently reside in the other state or
 - The other state's court has relinquished jurisdiction to NC and there is a court order from that other state relinquishing jurisdiction.

Parties and Personal Jurisdiction

- Identify the parties to the proceeding (G.S. 7B-401.1):
 - DSS (with standing)
 - Child
 - Parent 1

- Parent 2
- Putative father(s)
 - What efforts, if any, have been made to establish paternity, including identifying and locating missing parent?
 - Has paternity been established?
- Guardian
- Custodian
- Caretaker
- The parties have been properly served or waived service (G.S. 7B-406; 7B-407; 7B-200(b)).
- Have notice requirements been met?
- Any motions to intervene or remove a party as authorized by G.S. 7B-401.1(h).

Representation: G.S. 7B-601; 7B-602

- Parent's provisional counsel is
 - confirmed.
 - dismissed.
- Does an unrepresented parent desire and is he or she eligible for appointed counsel (may be reconsidered at any stage in the proceeding)? If yes, appoint counsel.
- If parent wants to waive the right to counsel, has the court examined the parent on the record and made findings to show that the waiver is knowing and voluntary?
- Parent is under age 18 and not emancipated. A Rule 17 GAL is appointed.
- There is a substantial question as to parent's competency and need for a Rule 17 GAL. A hearing on that issue is required.
- Abuse and/or neglect is alleged. A GAL and attorney advocate has been appointed for the juvenile.
- Only dependency is alleged. The court exercises its discretion to appoint a G.S. 7B-601 GAL and attorney advocate.

Relatives

- Has DSS identified and notified parents, relatives, or other persons with legal custody of the child's sibling(s) as potential resources for placement or support of the child?

Other Pretrial Issues

- Venue is proper, or venue is transferred pursuant to G.S. 7B-400.
- Are there any motions to continue the adjudication hearing, which must be held within sixty days of petition being filed (G.S. 7B-801(c))? Continuances are limited by G.S. 7B-803.
 - Is there good cause to continue the hearing for as long as reasonably necessary to receive additional evidence, reports, or assessments that the court has requested or other needed information in the best interests of the child?
 - Is there good cause to allow reasonable time for the parties to conduct expeditious discovery?

- Are there extraordinary circumstances that are necessary for the proper administration of justice or in the child’s best interests? (resolution of pending criminal charges arising from the same incident is not a sole extraordinary circumstance to continue the hearing).
- Are there discovery motions pursuant to G.S. 7B-700?
- Is DSS seeking to amend its petition as authorized by G.S. 7B-800?
- Is a writ requested for an incarcerated party?
- Is there a request for alternative means of participating? (G.S. 50A-111 when other state involved).
- Is there a request for the hearing or part of the hearing to be closed (G.S. 7B-801(a))?
- Is there a motion for genetic marker testing regarding paternity (G.S. 8-50.1(b1))?
- Is a language interpreter needed?
- Are accommodations for a disability needed to allow for participation in the court proceeding?
- Any other pretrial issue?

Compliance with Federal Laws

- Servicemembers Civil Relief Act: 50 U.S.C. 3931–3932*
Before a judgment for petitioner (DSS) is entered,
 - Each respondent has made an appearance in the case. No SCRA affidavit is required.
 - For each respondent who has not made an appearance, there is an affidavit or allegation in the verified petition that addresses that respondent’s military status.
 - It appears that a respondent is in military service. When that respondent has not made an appearance, appoint an attorney to perform SCRA responsibilities.
 - A respondent is in military service. When the requirements of 50 U.S.C. 3931(d), (f) or 50 U.S.C. 3932 are met, a stay of at least ninety days is required.
- Indian Child Welfare Act: 25 C.F.R. 23.107*
Mandatory inquiry as to child’s status as “Indian child” (defined at 25 U.S.C. 1903(4)) must be made of all participants at the commencement of the proceeding, with responses on the record.
 - The child is an Indian child. ICWA provisions apply.
Note: If child resides or is domiciled on Indian land or is a ward of tribal court, tribal court has exclusive jurisdiction unless an exception applies. Provisions of “emergency proceeding” under ICWA must be followed.
 - A participant has “reason to know” the child is an Indian child. Follow ICWA provisions unless and until court determines on the record that the child does not meet the definition of Indian child. Confirm that DSS or other party used due diligence to identify and work with all the tribes child may be member (or eligible for membership of).
 - The child is not an Indian child and no participant has reason to know the child is an Indian child. Instruct the parties to inform the court if they later receive information that provides reason to know the child is an Indian child. ICWA does not apply.

Stipulations or Consent Order (see Checklist 3: Adjudication)

Checklist 3

Adjudication

Prior to the adjudicatory hearing, the court should have held a pre-adjudication (or pretrial) hearing that addressed issues impacting the adjudication hearing (see Checklist 2). At the time of the adjudicatory hearing, the child may or may not be placed in nonsecure custody.

Child's Status

An adjudication determines the child's status as abused, neglected, or dependent based on conditions alleged in the petition. It is not a determination of a parent's, guardian's, custodian's, or caregiver's culpability.

AOC Form Order:

AOC- J-153, [Juvenile Adjudication Order \(Abuse/Neglect/Dependency\)](#) (Oct. 2013).

Procedure

- Hearing (G.S. 7B-802; 7B-805)
 - No default judgment or judgment on the pleadings is permitted.
 - DSS must prove the allegations in the petition by clear and convincing evidence (G.S. 7B-807).
 - The rules of evidence apply (G.S. 7B-804).
 - Evidence is limited to that which relates to the allegations in the petition; however, post-petition evidence of paternity being established may be introduced.
 - Stipulations of adjudicatory facts (G.S. 7B-807(a))

Must comply with one:

 - be in writing, signed by each party stipulating to the specific facts, and submitted to the court.
 - be read into the record, followed by an oral statement of agreement from each party agreeing to the stipulated facts.
 - Consent order (G.S. 7B-801(c))

All three are required:

 - All parties are present or represented by counsel who is present and authorized to consent.
 - The child is represented by counsel.
 - The court makes sufficient findings of fact.
-

Findings and Conclusions

The order shall (G.S. 7B-807)

- contain appropriate findings of fact (supported by competent evidence in the record);
- contain appropriate conclusions of law (supported by the findings of fact);

- if adjudicating the child abuse, neglected, or dependent, state that the allegations have been proved by clear and convincing evidence; and
- be entered (reduced to writing, signed, and filed with the clerk) no later than thirty days following completion of the hearing.

Note: If the petition alleged more than one condition (abuse, neglect, dependency), the order should make findings and conclusions about each.

Additional findings impacting reunification efforts:

- If evidence of an aggravating circumstance specified in G.S. 7B-901(c) is admitted, a finding of that aggravating circumstance will be required at adjudication (or in any other hearing prior to the initial dispositional hearing, see checklist 4) for the court to order that the department is not required to provide reunification efforts to a parent in the initial dispositional order.

Outcomes

The court adjudicates the existence or nonexistence of the condition(s) alleged in the petition based on a clear and convincing evidence standard (G.S. 7B-805; 7B-807).

- DSS fails to meet its burden of proof. Petition dismissed with prejudice. If child was placed in nonsecure custody, child must be released to his or her parent, custodian, guardian, or caretaker. (G.S. 7B-807(a)).
- DSS met its burden of proof by clear and convincing evidence. Child is adjudicated as one or more of the conditions alleged in the petition:
 - abused, and/or
 - neglected, and/or
 - dependent.

If the child is adjudicated abused, neglected, and/or dependent, the court proceeds to an initial dispositional hearing to be concluded within thirty days of completion of adjudicatory hearing (G.S. 7B-901). Pending entry of the initial dispositional order, the court should address the following in a temporary order:

- custody, placement, and visitation.

USING GENRES TO DEVELOP A THEORY

**Developing a
Theory of Defense**

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**What Is Not
a Theory of
Defense**

- The department can't prove that the juvenile is abused, or neglected, or dependent by clear and convincing evidence.

**What Is a
Theory of
Defense**

- One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial. —Mario Conte

What it does

- It helps tell your client's story of lack of culpability, reduced culpability, or unfairness
- It resolves problems or questions the judge may have about returning the finding you want

Elements of a Theory of Defense

- the facts
- the legal component (genre); and
- an emotional component

Facts

- Brainstorming



Abuse,
neglect,
dependency
genres

1. It never happened
2. It happened, but I didn't do it
3. It happened, I did it, but it wasn't abuse, neglect, or dependency
4. It happened, I did it, it was abuse, neglect, or dependency, I'm responsible, but DSS is overreacting
5. It happened, I did it, I'm responsible, please help me

Using the
fact
pattern

1. It never happened
2. It happened, but I didn't do it
3. It happened, I did it, but it wasn't abuse, neglect, or dependency
4. It happened, I did it, it was abuse, neglect, or dependency, I'm responsible, but DSS is overreacting
5. It happened, I did it, I'm responsible, please help me

An emotional
component



- I'm The Only Hell Mama Ever Raised
- My Wife Ran Off With My Best Friend,
And I Sure Do Miss Him
- He's Been Drunk Since His Wife's Gone Punk

Possible theory of defense

- Dangerous Dustin Davie endangers darling duo. Hardworking, single mother of two, Christi trusted him with the simple task of staying home for a few hours to watch her kids. Unaware of Dustin's dangerous dark side, Christi did not know that he was selling drugs. Now Christi is also his victim and he's MIA.

Next Steps

- Discovery
- Motions

DISCOVERY AND MOTIONS IN A/N/D PROCEEDINGS

**CONDUCTING DISCOVERY AND FILING
MOTIONS IN ABUSE, NEGLECT AND
DEPENDENCY PROCEEDINGS**

Allyson S. Shroyer
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March 6 & 7, 2019

**WHICH SPACE SHUTTLE FLEW MORE MISSIONS
THAN ANY OTHER SHUTTLE?**



DISCOVERY!

DISCOVERY- DON'T WAIT! ACT FAST

- Allegations in Petition as guide
- Thorough Intake with Client
- Client's doctors and therapists
- Interview Client's family and Friends

DISCOVERY- DO YOUR OWN INVESTIGATION

- ❖INTERVIEW FAMILY AND FRIENDS NEAR AND FAR
- ❖ATTEND THE FIRST CFT (Child and Family Team Meeting)
- ❖HAVE CLIENT PROVIDE YOU WITH RELEASES FOR ALL MEDICAL PROVIDERS

LET ME SEE YOUR FILE!

- GET THE DSS FILE RIGHT AWAY
- LOCAL RULES FOR VOLUNTARY
- SUBPOENA
- PROTECTIVE ORDER
- MOTION FOR DISCOVERY

DISCOVERY METHODS - YOU HAVE THE TOOLS!

- > Local Rules (voluntary?)
- > Statute- G.S. 7B-700
- > Subpoena Power!
- > Rules of Civil Procedure regarding Discovery
- > IDS HAS THE FORMS TO HELP!

**DISCOVERY- G.S. § 7B-700
SHARING OF INFORMATION; DISCOVERY**

- ⦿ § 7B-700. Sharing of information; discovery.
- ⦿ (a) Sharing of Information. - A department of social services is authorized to share with any other party information relevant to the subject matter of an action pending under this Subchapter...
- ⦿ (b) Local Rules. - The chief district court judge may adopt local rules or enter an administrative order addressing the sharing of information among parties and the use of discovery.

WHEN DSS JUST WON'T HAND OVER THAT FILE!

**DISCOVERY- G.S. § 7B-700
SHARING OF INFORMATION; DISCOVERY**

1. Draft a Motion for Discovery detailing the specific information sought. Include in the motion efforts made to obtain the information via voluntary information sharing.
2. Prepare a Notice of Hearing with a hearing date that is within 10 business days of the date the motion will be filed.
3. File the Motion and Notice of Hearing with the juvenile clerk. Be sure the motion is added to the calendar.
4. Serve the Motion and Notice of Hearing on all parties pursuant to Rule 5 of the Rules of Civil Procedure.
5. Prepare and file your Certificate of Service with the juvenile clerk

WHEN DO I NEED DEPOSITIONS?

Just like any other case:

- When you need to preserve testimony
- When you need to know how their expert or doc is going to testify
- Physical and Sexual abuse cases
- Client education (They need to hear it to believe it!)

NAME THAT TUNE!!!!

“I’VE GOT THE MOVES BABY,



I
_YOU GOT THE
MOTION! - Maddona

PARENT ATTORNEYS CAN FILE MOTIONS TOO!

- Get to know all of the pre-trial, trial, review and TPR, post TPR motions
- Treat this case like any other criminal or civil case!
- Don't wait to raise issues of visitation, plan compliance, contempt, etc. until the next PPH hearing.
- MOTION FOR REVIEW (AOC)
- IDS WEBSITE HAS GREAT SAMPLE MOTIONS

MOTIONS-G.S. § 1A-1, RULE 7

- Rule 7. Pleadings allowed; motions.
- (b) Motions and other papers. -
- (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. **The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.**
- (2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

MOTIONS-PRETRIAL

- > Motion for Foreign Language Interpreter/Translator (AOC-G-107)
- > Motion to Dismiss
- > Motion for Discovery (7B-700) To get DSS file if they won't produce it voluntarily)
- > Motion for Costs of Deposition
- > Motion to Quash
- > Motion for Funds for Expert Assistance

MOTIONS-PRETRIAL

- > Motion for Hearing on Placement or Visitation
- > Motion for ICPC Study
- > Motion for Home Study
- > Motion for Rule 17 GAL for Client (Order-AOC-J-206)
- > Motion for Paternity Testing
- > Motion to Change Venue

TRIAL MOTIONS

- > Motion for Writ for incarcerated parent to be brought to hearing (AOC-G-112)
- > Motion in Limine (especially when there are companion criminal cases)

REVIEW MOTIONS/ PRE AND POST ADJ/DISP

- > Motion for Review Hearing (AOC-J-140) MY GO-TO FORM!
- > Motion for Increased Visitation
- > Motion for Funds for Expert Assistance
- > Motion for Order to Show Cause/Motion for Contempt
- > Motion to Withdraw
- > Motion to Relieve Rule 17 GAL

TPR MOTIONS

- > Motion to Dismiss
- > Motion for Extension of Time to File and Answer
- > Motion for Personal Service
- > Motion to Recuse

POST HEARING MOTIONS

- > G.S. § 1A-1, Rule 58. Entry of judgment
- > G.S. § 1A-1, Rule 59. New trials; amendment of judgments
- > G.S. § 1A-1, Rule 60. Relief from judgment or order
- > Motion to Stay
- > Motion for Review (when no further reviews scheduled)
- > Motion for Review (when appeal pending)

EVIDENCE ISSUES

Child Evidence Issues

John Rubin
School of Government
March 2019



Values, Not Just Rules

- Avoid unreliable evidence
 - Rules re personal knowledge, hearsay, opinion
- Minimize prejudicial distractions
 - Rules re relevance
- Promote social policies
 - Rules re privilege
- Ensure fairness
 - Predictability and notice

Key Types of Evidence

- Child taking stand
- Others taking stand to repeat what child said (or other statements)
- Others taking stand to give opinion about child (or other opinions)

Child Taking the Stand

- You have subpoenaed both children to testify to the circumstances in the home at the time the gun was fired. DSS has moved to quash.
 - What is the legal standard for determining whether the children may testify?
 - Are there other grounds for objection?

Now I Get It!

- Hearsay is an out-of-court statement offered to prove the truth of the matter asserted

For the Truth

- When the out-of-court statement is being used to prove the truth of what was said
 - the evidence's value depends on *the credibility of the out-of-court declarant*
- The declarant therefore must be subject to cross-examination to test the declarant's credibility
 - Or the statement must satisfy a hearsay exception

Not for the Truth

- When the out-of-court statement is not being offered for the truth of what was said
 - the evidence's value usually depends on *the credibility of the in-court witness*
- The in-court witness therefore must be subject to cross-examination to test that witness's credibility

Is It Really Hearsay?

- You want to offer the following evidence. DSS objects on hearsay grounds.
 - Police officer testifies that Alec said to him, "I never saw the box before."
 - Police officer testifies that when Christi Clay called the house, she said, "I want to speak with Dustin."
- Is each statement an assertion, offered for its truth?

Rule 803 Exceptions

- Statements are admissible because they carry inference of reliability or sincerity
- Principal exceptions:
 - Business and public records
 - Excited utterance
 - Medical diagnosis or treatment
- Admissions of party-opponent

Business and Public Records

- The business records exception applies if the records satisfy the requirements concerning
 - the method and circumstances of preparation
AND
 - the contents of the records

Preparation of Record

- Proponent must establish foundation, including authenticity, by qualified witness
 - Maker of record need not lay foundation; another employee of organization may do so
 - Affidavit of nonparty permissible under Evidence Rule 803(6)

Contents of Records

1. Information within record must have been provided by person with knowledge

Evidence Rule 602

“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.”

Contents of Records

1. Information within record must have been provided by person with knowledge
2. Information must have been provided by person with duty to report information accurately
3. Any opinion must satisfy rules on opinion testimony

Business/Public Records?

- Key requirements
 - Knowledge?
 - Duty to report accurately?
 - Admissible opinion?
- Officer's report "testifies"
 - [I saw] the house was clean and there was sufficient food and clothing.
 - [My] search of the house revealed male clothing in Ms. Clay's closet and men's aftershave in the bathroom.

Excited Utterance

- The excited utterance exception applies if the statement
 - was made after a sufficiently startling experience, and
 - was a spontaneous reaction

Excited Utterance?

- Factors
 - Lapse of time
 - Location (at or away from scene)
 - Spontaneously uttered
 - Appearance of declarant
 - Nature of statement
 - Conduct after event
- Officer (or officer's report) testifies:
 - When I asked Alec what happened, he said, "I've never seen the box before."

Medical Diagnosis and Treatment Exception

- Declarant made statements understanding they would lead to medical diagnosis or treatment, and
- Statements were reasonably pertinent to diagnosis and treatment

Medical Treatment?

- Requirements
 - Declarant made statements understanding that they would lead to medical diagnosis or treatment; and
 - Statements were reasonably pertinent to diagnosis or treatment
- Social worker testifies:
 - Alec said, "I'm having nightmares." I therefore referred him to a therapist.

Medical Treatment?

- Requirements
 - Declarant made statements understanding that they would lead to medical diagnosis or treatment; and
 - Statements were reasonably pertinent to diagnosis or treatment
- Suppose that Dr. Nash testifies:
 - Alec said, "He and his sisters were left at home all the time."
 - Alec said, "Dustin Davie had friends over at all hours of the day."

Admission of Party-Opponent

- Statements of parent
- Statements of DSS worker, law enforcement officers, and other government agents
- Statements of child

Residual Hearsay

- If offered under residual hearsay exception in Rule 804(b)(5)
 - Circumstantial guarantees of trustworthiness exist
 - Witness is unavailable
- If offered under residual hearsay exception in Rule 803(24)
 - Circumstantial guarantees of trustworthiness exist
 - Evidence must be more probative than other available evidence

Advance notice required under both rules

Non-Substantive Theories of Admissibility

- Corroboration
 - Out-of-court statements are admissible as corroboration if consistent with witness's in-court testimony
- Impeachment
 - Proponent may impeach own witness but may not call witness knowing that witness would not reiterate prior statement
- In both instances
 - Witness must have taken stand
 - Prior statements do not constitute substantive evidence BUT ONLY IF YOU OBJECT

Trust Your Instincts



Lay Witness Opinion

- A lay witness's testimony in the form of an opinion or inference is permitted if it is "rationally based on the perception of the witness"
 - Shorthand statements of fact are permissible

Expert Testimony In Lay Opinion Clothing

Interpretation or assessment based on specialized knowledge is expert opinion



Expert vs. Lay Opinion

- “[W]hen an expert witness moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment ‘to assist’ the jury based on his ‘specialized knowledge,’ he is rendering an expert opinion.”
 - *State v. Davis*, 368 N.C. 794 (2016)

Is Testimony Admissible?



Rule 702(a)

- If scientific, technical or other specialized knowledge will assist the trier of fact . . . a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion . . . if all of the following apply . . .
 - Sufficient facts or data
 - Reliable principles and methods
 - Reliable application of principles and methods

Post-702 Amendment Cases

- Opinion about cause of injuries remains permissible when there is physical evidence
 - *State v. Dye*, ___ N.C. App. ___, 802 S.E.2d 737 (2017)
- Opinion about characteristics is expert opinion (and therefore is subject to Rule 702)
 - *State v. Davis*, 368 N.C. 794 (2016)

More Post-702 Amendment Cases

- Opinion about suggestibility of children is admissible if it satisfies the requirements of Rule 702
 - *State v. Walston*, 244 N.C. App. 299 (2015), *rev'd on other grounds*, 369 N.C. 547 (2017)



Parent Attorney

Chapter 11

Evidence¹

11.1 Applicability of Rules of Evidence 11-5

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 - 3. Evidence issues involving children
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- A. Competency of Child Witnesses
 - 1. General rule
 - 2. Procedure for determining competency
 - 3. Application of standard
 - 4. Unavailability distinguished from incompetency
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- B. Examination of Child Witnesses
 - 1. Remote testimony
 - 2. Excluding bystanders during child's testimony
 - 3. Excepting witnesses from sequestration order
 - 4. Oath for child witness
 - 5. Leading questions
 - 6. Written testimony
 - 7. Use of anatomical dolls to illustrate testimony
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 - 9. Questioning by court
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11.3 Out-of-Court Statements to Refresh, Impeach, or Corroborate 11-17

- A. Refreshing Recollection
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- C. Corroboration

11.4 Out-of-Court Statements and the Right to Confront Witnesses 11-19

- A. Applicability of Confrontation Clause to Criminal and Delinquency Cases
 - 1. General rule

¹ This Chapter is by School of Government faculty member John Rubin. His work in this area owes its start to Ilene Nelson, former administrator of North Carolina's Guardian ad Litem program, and Janet Mason, former School of Government faculty member, who many years ago began thinking and writing about how evidence principles apply in juvenile cases.

- 2. Applicability to statements made to law-enforcement personnel, social workers, medical personnel, and others
- B. Inapplicability of Confrontation Clause to Juvenile Cases

11.5 Out-of-Court Statements and the Hearsay Rule 11-21

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- B. Rationale for Hearsay Rule
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 - 1. Criteria
 - 2. Potential constitutional, statutory, and other bars
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- C. Rule 803(2): Excited Utterances
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- D. Rule 803(3): State of Mind
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- E. Rule 803(4): Medical Diagnosis or Treatment
 - 1. Criteria
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- F. Rule 803(6): Business Records
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 - 2. Collateral estoppel
 - 3. Formal concessions; stipulations of fact
- E. Documentary Evidence, Court Reports, and Other Exhibits
 - 1. Summary
 - 2. Juvenile cases on documentary evidence
- F. Testimony
 - 1. Summary
 - 2. Hearsay nature of prior testimony

11.8 Character and Prior Conduct 11-60

- A. Generally
- B. Theories of Admissibility of Character Evidence
 - 1. Character directly in issue
 - 2. Character to show conduct
 - 3. Credibility
 - 4. Opening the door
- C. Is Character Directly at Issue in Juvenile Cases?
- D. Rule 404(b) and “Bad Act” Evidence
 - 1. Applicability of rule
 - 2. Basic requirements for admission of other acts under Rule 404(b)
 - 3. Form of proof; prior criminal proceedings
- E. Rape Shield Law

11.9 Lay Opinion 11-66

- A. Lay and Expert Testimony Distinguished
 - 1. Rule 602 and the requirement of personal knowledge
 - 2. Rule 701 and the allowance of inferences if rationally based on perception and helpful
- B. Examples of Permissible and Impermissible Lay Opinion
 - 1. Shorthand statements of fact, including statements about mental and emotional condition
 - 2. Lay opinion requiring special expertise
 - 3. Guilt of another person
 - 4. Truthfulness of another person’s statements

11.10 Expert Testimony 11-71

- A. Revised Evidence Rule 702(a)
- B. Three Basic Requirements
 - 1. Generally
 - 2. Scientific, technical, or other specialized knowledge that will assist trier of fact
 - 3. Qualified as an expert
 - 4. Three-pronged reliability test
- C. Other Requirements for Expert Opinion
 - 1. Rule 403 balancing
 - 2. Degree of certainty of opinion
 - 3. Permissible topics and purposes
- D. Expert Testimony about Children
 - 1. Credibility
 - 2. Legal conclusions
 - 3. Identity of perpetrator
 - 4. Cause of physical injuries
 - 5. Battered child syndrome
 - 6. Opinion about abuse if no or inadequate evidence of physical injuries
 - 7. Psychological syndromes
 - 8. Characteristics of abused children
 - 9. Delayed disclosure
 - 10. Repressed memory
 - 11. Suggestibility of children
 - 12. Examination of child by respondent's expert
- E. Expert Testimony about Parents
 - 1. Generally
 - 2. Polygraph evidence

11.11 Evidentiary Privileges 11-84

- A. In Abuse, Neglect, and Dependency Proceedings
 - 1. Effect of broad negation of privileges in G.S. 7B-310
 - 2. Effect of specific negation of privileges in G.S. Chapter 8
 - 3. Attorney-client and clergy-communicant protections
 - 4. Protections against disclosure of confidential information
- B. In Termination of Parental Rights Proceedings

11.12 Right against Self-Incrimination 11-87

- A. Right Not to Answer Incriminating Questions
- B. No Right Not to Take Stand
- C. Drawing Adverse Inference from Refusal to Answer

11.13 Evidence Procedures 11-89

- A. Production of Witnesses and Documents
- B. Pretrial Motions in Limine, Objections, and Other Notices
- C. Pre-Adjudication Conference
- D. Objections at Trial
 - 1. Timely objection

2. Grounds for objection
 3. Evidence for limited purpose
 4. Motion to strike
 5. Offers of proof
 6. Importance of complete recordation
-

WORKSHOP: ADJUDICATION PREPARATION

North Carolina Advanced Parent Defender Program
Sponsored by the UNC School of Government and
North Carolina Office of Indigent Defense Services
Chapel Hill, NC

Hearing Advocacy Aids

Compiled by Whitney Fairbanks and John
Rubin, based on materials by Ira
Mickenberg, Whitney Fairbanks, Alyson
Grine, Ann Roan, Susan Brooks, Jon
Rapping, Fred Friedman, Kendall Hill, Mary
Moriarty, and many other defenders

Brainstorming Basics

1. Be factual and specific

- Not law
- Not conclusions
- Not endless rounds of questions (although do keep a list of matters requiring more investigation)

2. Be Inclusive

- Case facts, events, actions
- People (personalities, motivations, interrelationships, influences)
- Places, objects
- Investigative and other procedures

3. Be non-judgmental

- Facts are not good, bad, or beyond change . . . yet

4. Be associative

- Develop additional facts and ideas from facts that have been identified

5. Be literal

- Write down facts as close to verbatim as possible; don't paraphrase

6. Be ready to investigate further

- Keep a list of facts, ideas, possibilities that require further interviews, discovery, etc.

Creating a Theory of Defense

A theory of defense is a short written summary of the factual, emotional, and legal reasons why the judge should return a favorable decision. It gets at the essence of your client's story of no culpability, reduced culpability, or unfairness; provides a roadmap for you for all phases of trial; and resolves problems or questions that the judge may have about returning the decision you want.

Steps in creating a theory of defense

Pick your genre¹

1. It never happened
2. It happened, but I didn't do it
3. It happened, I did it, but it wasn't abuse, neglect, or dependency
4. It happened, I did it, it was abuse, neglect, or dependency, I'm responsible, but DSS is overreacting
5. It happened, I did it, I'm responsible, please help me

Identify your three best facts and three worst facts

- Optional step to test the viability of your choice of genre

Come up with a headline

- Barstool or tabloid headline method

Write a theory paragraph

- Use your headline as your opening sentence
- Write three or four sentences describing the essential factual, emotional, and legal reasons why the judge should return a decision in your favor
- Conclude with a sentence describing the conclusion the judge should reach

Develop recurring themes

- Come up with catch phrases or evocative language as a shorthand way to highlight the key themes in your theory of defense and move your audience

¹ In creating our A/N/D genres, we drew heavily on a list that criminal defense attorneys have long relied upon when creating a theory of defense. Criminal defense genres include 1.) It never happened (mistake, setup); 2.) It happened, but I didn't do it (mistaken id, alibi, setup, etc.); 3.) It happened, I did it, but it wasn't a crime (self-defense, accident, elements lacking); 4.) It happened, I did it, it was a crime, but it wasn't this crime (lesser offense); 5.) It happened, I did it, it was the crime charged, but I'm not responsible (insanity); 6.) It happened, I did it, it was the crime charged, I'm responsible, so what? (jury nullification)

Storytelling

(by which we mean tell your client's story, not make stuff up)

1. Characters

Before every trial, ask yourself, "Who are the characters in the story I am telling to the judge, and how do I want to portray them to the judge? What are their roles?"

- Who is the hero and who is the villain? Who are the other characters?
 - What role does my client play?
 - What role does the child play?
 - What role does the social worker play?
 - What role does the other parent play?
 - What role do the police play?

2. Setting and Scenes

Where do the most important parts of YOUR story take place?

- What are the key scenes?
- What scenes must be included to make your story persuasive?

3. Sequence

In what sequence do you want to tell the events of YOUR story?

- Decide what is most important for the judge to know
- Follow principles of primacy and recency:
 - Front-load the strong stuff
 - Start on a high note and end on a high note

4. From whose perspective do you want to tell the story?

5. What emotions do you want the judge to feel when hearing your story? What character portrayals, scene settings, sequence, and perspective will help the judge feel that emotion?

Drafting Your Opening Statement: A Short Template

The Hook -- Start with a thirty to sixty second statement that encapsulates your theory of defense and establishes the emotional themes that will make the judge feel it is right to accept your theory. The hook should tell the judge in factual terms exactly why you should win. It should not be an argument.

EXAMPLE: Rick Grimes is not a neglectful father. Judith Grimes is not a neglected child. Yes, Rick burned Judith's clothes. But only after repeated attempts to get Judith to stop wearing gang clothes and only after consulting with the police department about appropriate interventions. DSS is overreaching here. No, Judith is not neglected. She is a teenager. And Rick is frustrated but trying hard and doing a good with what he's got.

QUESTION: WHAT IF THE AGENCY ATTORNEY OR JUDGE OBJECTS, SAYING THAT THIS IS TOO ARGUMENTATIVE? (They would be wrong, but being wrong never stopped a judge or agency attorney in the past).

ANSWER: RE-START YOUR OPENING LIKE THIS:

Rick Grimes is not a neglectful father. Yes, the evidence will show Rick burned Judith's clothes. That same evidence will also show that the only reason he did so was on the advice of a law enforcement officer. The evidence will conclusively show that Rick Grimes is not neglectful because he was only trying to properly discipline his teenage daughter.

The Story -- The main part of your opening, in which you tell the judge the factual story of your client's innocence or reduced culpability. Your opening should not contain the entire story of the case, in all its detail. It should, however, hit the high points and tell the judge everything that is essential to acquitting.

EXAMPLE: Two weeks before Rick burned some of Judith's gang clothes, he contacted the Department and asked for advice. They said they would get back to him. They didn't. Two weeks before he burned some of Judith's gang clothes, Rick went out and bought her new dresses. One day before, he spoke with Officer Onslow...etc.

The Conclusion -- In which you tell the judge what you want them to do.

EXAMPLE: After hearing all the evidence, you will find that Rick Grime's burned Judith's gang clothes only because he loves her and was trying to properly discipline her. You will find that Rick Grimes is a frustrated parent. You will not find him neglectful. You will not find Judith a neglected child.

After your hook, story, and conclusion, sit down.

The Three P's of Direct Examination

1. PLAYERS

- Select witnesses who advance your theory of the case

2. PREPARATION

- Think about your questions
 - Open-ended
 - Who
 - What
 - When
 - Where
 - How
 - Why
 - Tell us about/Describe
 - Tap all of the senses. What did you do, think, feel, see, smell? Place your witness in important scenes to bring them to life.
 - EXAMPLE: How did you find Judith's gang clothes? [I do the laundry. Over time I noticed there were no more dresses, just baggy jeans and baggy red t-shirts.] When you realized your daughter was wearing gang clothes, how did you feel? [I was scared, the hair on the back of my neck stood up, etc.]
 - With a purpose and direction
 - Mix general and specific questions to direct your witness to the information you want to emphasize and to control the examination
 - EXAMPLE: When you realized Judith was wearing gang clothes, what went through your mind? What did you do? NOT: When you realized Judith was wearing gang clothes, what happened? And, what happened next? And, after that?
- Prepare and practice with the witness

3. PRODUCTION

- Remember primacy & recency. Start and end on a strong point.
- Arrange your direct through "chapters" and "signposts"
 - EXAMPLE: "Mr. Grimes, now I want to ask you about the day you bought Judith a new wardrobe." AND "Mr. Grimes, now I want to go back to the day you spoke with Officer Onslow."
- Elicit factual details of scenes you want to emphasize
- Tap into your frustrated inner actor. You are a part of the scene.
- Have a conversation with the witness
- Listen. The witness may give you a gold nugget that you can expand on; you don't want to miss it because you are focused on your next question.

Cross-Examination

1. Purpose – cross-examination must advance the defense theory by eliciting answers that provide facts that either:

- a. Affirmatively advance your defense theory, or
- b. Undermine/discredit the deaprtment’s evidence that hurts your defense theory (not scattershot)

2. Structure

- a. Compile the facts that are the building blocks of the defense theory. For example, one block might be “the social worker did not adequately investigate.”
- b. Identify 3-5 important points you wish to make with these facts. For example, one point might be “Mr. Grime’s asked for advice.”
- c. Write chapters
 - i. each of the 3-5 points is a chapter
 - ii. order the facts (for example, from general to specific) to lead logically to the conclusion you want the judge to draw
 - iii. do not ask the ultimate question about the conclusion you want the judge to draw (you’ll almost always be disappointed)
- d. Organize the chapters
 - i. primacy and recency
 - ii. tell a persuasive and coherent story
- e. Transition between chapters with headlines

3. Control

- a. Leading questions
- b. One fact per question
- c. Keep questions short and simple
- d. Never ask a question that calls for an answer you don’t know
- e. Listen
- f. Each question must have a purpose

- g. Avoid tags (e.g., saying “ok” after every answer or “and” at the beginning of every question)
- h. Loop.

“Rick Grimes called you. Mr. Grimes called you on August 10. He left you a voicemail. When Mr. Grimes called you, he asked for your advice?”
- i. Consider language
 - i. talk like a “regular” person
 - ii. use words that advance your defense theory
- j. Do not argue with/cut off the witness. If a witness gives a non-responsive answer, be sure you asked a leading question containing one fact and, if so, repeat the question. For example, “Thank you. But, my question is “The man you saw had a beard?”
- k. Do not treat all witnesses the same. Do not beat up grandma (unless she is a villain in your story).

4. Preparation

- a. Investigation (and other forms of fact gathering)
 - i. Evidence of unreliability (perception, memory)
 - ii. Evidence of lack of credibility (bias, prior inconsistent statements, prior convictions, character evidence)
- b. Anticipate objections
- c. Have impeachment ready

Formula for Impeachment by Prior Inconsistent Statement

1. Recommit the witness to her testimony

Get the witness to repeat the statement he just made at trial (for example, you testified on direct that the light was green, correct?).

2. Validate the prior statement

a. Ask the witness if she made a prior statement (don't ask about the substance of that prior statement, just about whether he made one – you will get to the substance in a minute).

b. Accredit the prior statement (e.g., ask about the importance of the prior statement, the witness's duty in making it, the opportunity to review/edit/sign it, the proximity in time between the events and prior statement, etc.).

3. Confront the witness with the prior statement

a. Mark the prior statement for identification (don't try to introduce it into evidence yet).

b. Confront the witness with the substance of the prior statement and ask the witness if he made that statement. You should read the statement aloud to the witness, rather than have the witness read the statement, to maintain control over the volume, emphasis, inflection, etc. of the statement.

i. If the witness admits making the prior statement, stop there. You have established the inconsistency and do not need to do anything else. (Under North Carolina law, you also may be able to offer the statement itself into evidence if it bears on a material fact in the case, but you are not required to do so.)

ii. If the witness denies making the prior statement, move to have the statement admitted into evidence as a prior inconsistent statement. Under North Carolina law, you are not bound by the witness's denial and may introduce extrinsic evidence of the statement (e.g., the statement itself or testimony by another witness about the statement) if the statement bears on a material fact in the case or goes to bias. You may need to call another witness to authenticate a written statement that is not self-authenticating—for example, a letter or other written statement by the witness may require additional testimony to authenticate it.

c. *Do NOT give the witness a chance to explain the inconsistency.* That's up to the agency attorney on redirect.

EXAMPLE: At a preliminary hearing, the witness testified that the light was green. At trial, he testified on direct examination that the light was red. Here's how to impeach.

NOTE: Which is better for your theory of defense, a green light or a red light? If a red light is better, DON'T IMPEACH. If, on the other hand, a green light is better, use the preliminary hearing transcript to impeach the witness.

1. **Recommit**

Q: You testified on direct examination that the light was red?

A: Yes.

2. **Validate**

Q: Do you remember testifying at a preliminary hearing on March 15th of this year?

A: Yes.

Q: Before testifying, you were asked to take an oath to tell the truth at the preliminary hearing?

A: Yes.

Q: You took that oath?

A: Yes

3. **Confront**

Defense counsel then marks the relevant lines of the preliminary hearing for identification and shows the exhibit to the agency attorney if the agency attorney has not already seen it.

Q: At that preliminary hearing, you were asked the following question and gave the following answer? "Question: 'What color was the light?' Answer: 'Green'"

A: Yes

Stop Here. The Witness Has Acknowledged the Inconsistency and Is Impeached

OR

A: No.

Now Offer the Relevant Lines of the Preliminary Hearing Transcript Into Evidence (the transcript is self-authenticating as an official record and no other witness is required to authenticate it)

NOTE: Do not offer the entire transcript into evidence: Everything except the inconsistent statement is both irrelevant and hearsay. And, it probably contains a lot of other stuff that you don't want the judge seeing.

Final Argument

Tips for Writing a Final Argument

FIND AN OPENING HOOK

START WITH A SCENE

AVOID LEGAL LANGUAGE

DO NOT WRITE AS IF YOU ARE GIVING A LECTURE. YOU ARE WRITING PERSUASIVELY TO DECISION MAKERS

BLOCK YOUR ARGUMENTS OFF OF YOUR THEORY

ORGANIZE YOUR ARGUMENTS OFF OF YOUR THEORY AND DETERMINE THE ORDER OF THE ARGUMENTS

DECIDE WHAT TESTIMONY CAME UP AT TRIAL THAT YOU WANT TO HIGHLIGHT IN FINAL. DECIDE WHEN IN FINAL YOU WANT TO INSERT IT.

USE DEMONSTRATIVE EVIDENCE/VISUAL AIDS

WORK ON CRAFTING YOUR LANGUAGE

USE TRILOGIES

REPEAT YOUR THEME

TELL TWO STORIES.

- Not about the case but about what really is

- Relate facts of the case but in story fashion

HAVE A BETTER STORY

BE A BETTER STORY TELLER

FIND A CLOSING HOOK

Tips for Delivering a Final Argument

ACKNOWLEDGE YOUR CLIENT

DEFINITELY USE VISUAL AIDS—PowerPoint, diagrams, maps, something

REFER TO AND HANDLE ALL ADMITTED EXHIBITS—either they help you or discard them because they are of no relevance or miss the point or do not go to guilt

1. ASSERT YOUR CLIENT’S LACK OF CULPABILITY

2. THEME—say it once early and once late

3. THEORY—say nothing that is inconsistent with your THEORY

4. GENRE—one and only

5. WHAT IS NOT AT ISSUE?

6. WHAT IS AT ISSUE?

7. HUMANIZE YOUR CLIENT

8. HUMANIZE YOURSELF. BE CREDIBLE WITH THE JUDGE

9. CONSIDER TELLING TWO STORIES

-A story with a moral

-The story of innocence in this case

10. DECIDE WHAT FACTS YOU MUST MENTION

11. BE TOTALLY HONEST

12. BE SINCERE

13. ARGUE WITH PASSION

14. LET EXPERIENCES IN EVERY PHASE OF YOUR LIFE ENRICH AND IMPROVE YOUR ARGUMENTS

PROMOTING CLIENT'S OBJECTIVES: STRATEGIZING DISPOSITION

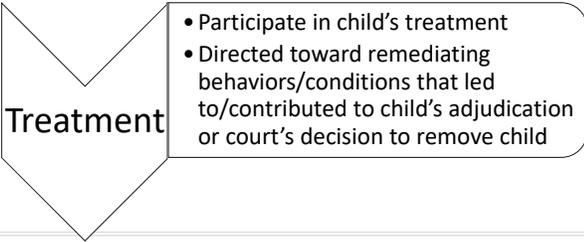
Promoting Client's Objectives: Strategizing Disposition

INTENSIVE PARENT DEFENDER TRAINING
DOROTHY HAIRSTON MITCHELL

PERSONAL JURISDICTION G.S. 7B-200(b)

- Ordering Respondents to do something
- Parent*
- Guardian
- Custodian
- Caretaker**

Court's Authority Limited by Juvenile Code G.S. 7B-904



**Court's Authority Limited by Juvenile Code
G.S. 7B-904**

Conditions

- Compliance with treatment (can condition legal custody/placement on it)
- Parenting classes if available in judicial district where resides
- Take appropriate steps to remedy conditions that led/contributed to adjudication/removal
- If in home, provide transportation for child's appointments for treatment

**Court's Authority Limited by Juvenile Code
G.S. 7B-904**

Pay Support

- Reasonable sum to cover support of juvenile in legal custody of someone else
- Child support
- Cost of treatment for child and/or self* (ability to pay)

**Court's Authority Limited by Juvenile Code
G.S. 7B-904**

Treatment

- Participate in child's treatment
- Directed toward remediating behaviors/conditions that led to/contributed to child's adjudication or court's decision to remove child

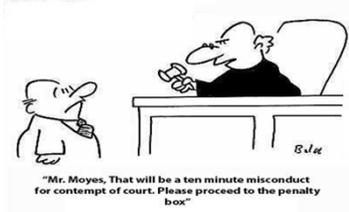
Conditions

- Compliance with treatment (can condition legal custody/placement on it)
- Parenting classes if available in judicial district where resides
- Take appropriate steps to remedy conditions that led/contributed to adjudication/removal
- If in home, provide transportation for child's appointments for treatment

Pay Support

- Reasonable sum to cover support of juvenile in legal custody of someone else
- Child support
- Cost of treatment for child and/or self* (ability to pay)

Noncompliance
7B-406(c); 7B-904(e)



NEXUS!!!



Treatment & Conditions: Removal or Adjudication

Findings are crucial
In re H.H.

Reason to amend
or file second
petition

Impact on TPR

What was the basis of the adjudication?

What brought this child into care?



General Things to Consider



Parent

- Mental Health
- Substance Abuse
- Domestic Violence
- Parenting Classes
 - Various Types
- Individual/Group Therapy
- Work
- Education
- Visitation

Child(ren)

- All of the above
- Extracurricular activities

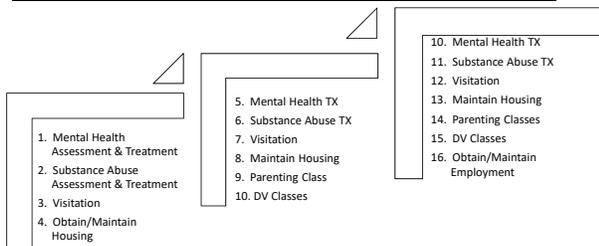
Judges can order whatever they want, Right?

No, not really, but do...



while always keeping in mind what the parent (*and the child*) may need, what the parent needs to do (*to correct the conditions that led to removal*) and what they should get orders overall.

Staggered case plan



Dealing with Setbacks

- Missed Mental Health Appointments
- Relapse
- Missed Visits
- Problems with obtaining Housing
- Loss of Housing
- Missed DV Classes or Parenting Classes (and other appts. for self and/or children)
- Problems with obtaining employment
- Loss of Employment

How Parents view themselves in this process



How do you see yourself?



Case plan example & Parent's schedule

Case Plan for Parent

Employment

Works at Dajangles 40+ hours per week

Monday: 6am-2:30pm
Tuesday: 10-6:30pm
Wednesday: 12-8:30pm
Thursday: 6am-2:30pm
Friday: 10-6:30pm

Individual Therapy

1 day per week for 2 hours
Weds: 9-11am

Substance Abuse Treatment

3 days per week group for 1 hour
Mon., Weds.: 4-5pm
Friday: 8-9am

Domestic Violence Classes

1 day per week for 1.5 hours (26 weeks)
Thursday: 6-7:30pm

Parenting Classes

1 day per week for 1.5 hours (16-20 weeks)

[Weekly Schedule Sunday to Saturday.docx](#)

Weekly schedule

Name: _____

Time / period	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
6:00 am							
7:00 am							
8:00 am							
9:00 am							
10:00 am							
11:00 am							
12:00 pm							
1:00 pm							
2:00 pm							
3:00 pm							
4:00 pm							
5:00 pm							

6:00 pm												
7:00 pm												
8:00 pm												
9:00 pm												
10:00 pm												

Notes

Visits with Kids: KV (or visitation)
 Parenting Class: PC
 DV Class/Group: DVC
 Anger Man.: AM
 Therapy: TH
 Subst. Abs. TX: SAT (or NA or AA)
 Mental Health Appt.: MHA
 SW Meeting: SWM
 GAL Meeting: GALM
 Medical Appt.: MA (or name dr.)
 Work: WK
 School: SCH

REVIEW AND PERMANENCY PLANNING HEARINGS

Review and Permanency Planning Hearings

INTENSIVE PARENT DEFENDER TRAINING
March 2018
Dorothy Hairston Mitchell

REVIEW HEARING 7B-906.1



- Initial Hearing: **MUST** be conducted within 90 days of the disposition hearing
- Subsequent Hearings: **MUST** be conducted up to 6 months apart
- 15 days notice to all parties
 - Notice to some non parties include: foster parents, caretakers, juvenile over 12
- Standard of Review – “Best Interests of the child”
- Burden of Proof is not on any particular party
- Rules of Evidence are relaxed
- Hearsay is allowed
- Order **MUST** be reduced to writing, signed and entered no later than 30 days following the hearing

Court may not waive or refuse to conduct a review hearing if a party files a motion seeking review

PLACEMENT OF THE CHILD

- If the child is outside the home is there a NEED for that placement to continue
 - Is the parent’s home safe?
 - Could the child be safe with the parent?
 - Have the conditions that led to removal been corrected?
 - Has the parent completed court ordered services or other requirements?
 - *Show the court what progress parent has made even if not full completion*
 - *Show whether certain requirements are no longer feasible or that some should be substituted*

VISITATION

- How has visitation been going?
- Should it be modified in any way?
 - Have the court to look at the following:
 - frequency
 - duration
 - location
 - supervised/unsupervised
 - authorized supervisors
 - sibling visitation
 - visitation with others
 - trial placement



APPROPRIATENESS OF CURRENT LONG TERM PLAN

- Reunification
 - Would it be futile or inconsistent with the juvenile's safety and need for a safe, permanent home?
 - *Parent should show in every possible way to the court that reunification is still feasible and should continue*
 - DSS or GAL may seek to show that reunification is not appropriate due to following:
 - Parent has not made sufficient progress
 - Parent is in jail/prison and will be there for a long term
 - Parent has not been located or has not shown up for an extended period of time
- Independent living for 16 or 17 year old child
 - An assessment is done when appropriate and reported to the Court
 - An independent living plan is developed if appropriate

APPROPRIATENESS OF CURRENT PLACEMENT & CHILD'S NEEDS

- Are the child's needs being met?
 - Look at services for the child
 - therapy
 - school and other education
 - medical
 - extracurricular
 - visitation with parents and others
- Is the current placement appropriate to meet the child's needs?
 - Is the foster parent/caretaker attending to the child appropriately?
 - Is there shared parenting taking place?
 - Is the foster parent/caretaker acting appropriately with the child *and the parent?*
 - How is the child behaving?

REASONABLE EFFORTS BY DSS

- What has DSS done to . . .
 - eliminate the need for placement outside the home;
 - ensure that the child's needs are being met;
 - monitor the current placement and appropriateness of the foster parents/caretakers;
 - help the parents meet their court ordered requirements;
 - coordinate and monitor visitation
- Do not just rely on the reports of the social worker as to what their efforts have been
- Do not be afraid to scrutinize the efforts of the social worker
- "Reasonable" standard for social worker is not always the same as "reasonable" standard when it comes to parents' progress

PERMANENCY PLANNING HEARING 7B-906.1



- Purpose is to ensure that a plan is in place to return the child or to achieve another safe plan and permanent home for the child within a reasonable time
- Hearing can be combined with a regular review hearing
- Initial Hearing: **MUST** be conducted within 12 months of the initial order removing the child from the home to develop a permanent plan
- Subsequent Hearings: **MUST** be conducted no more 6 months apart to review the plan
- Required hearing within 30 days after the Court ceases reunification efforts
- 15 days notice to all parties
 - Notice to some non parties include: foster parents, caretakers, juvenile 12 or over

PERMANENCY PLANNING HEARING Cont.

- Standard of Review "Clear and Convincing Evidence"
- Burden of Proof is not on any particular party
- Rules of Evidence are relaxed
- Hearsay is allowed
- Order **MUST** be reduced to writing, signed and entered no later than 30 days following the hearing

FACTORS THE COURT MUST CONSIDER

- Can the child be returned home immediately or within 6 months?
- Can the child be safe with the parent and in their home?
- What progress has the parent made?
- Have the conditions that led to removal been corrected?
- What should be the permanent plan or should be continued as plan?
 - Reunification
 - Custody to a court approved caretaker
 - Guardianship to a court approved caretaker
 - Adoption
 - APPLA (Another Planned Permanent Living Arrangement)
 - Combination of two
- After initial PPH hearing has DSS made reasonable efforts to implement the permanent plan and should those efforts continue?
- Any other factors the Court deems necessary

*Options only if
return is not
possible or is
unlikely*

CUSTODY TO A COURT APPROVED CARETAKER & GUARDIANSHIP

- Relatives should be considered first
- Parent should show the Court how either of these plans should be pursued over adoption
 - ***Show the court that DSS has not explored these options with perspective long term caretaker or guardian if they are asking for adoption
- Court must find . . .
 - -termination of parental rights is not in the child's best interest;
 - -why the child can not be safely returned to the parent;
 - -that the perspective caretaker or guardian is appropriate and has the means to care for the child permanently
- Per 906.1(j): judge must verify and make written findings that the potential custodian or guardian "understands the legal significance of the placement or appointment and will have adequate resources to care for the child"

CUSTODY TO A COURT APPROVED CARETAKER & GUARDIANSHIP Cont.

- Either plan allows for the parent to still have contact with the child
 - Minimum visitation must be outlined
- DSS and Court supervision is no longer required
- Parent must still continue to work on court ordered requirements or maintain compliance
- Parent can file a motion later for increased visitation or for return of custody
 - Special showing for termination of guardianship

ADOPTION

- What makes adoption the better option?
 - Court must find that termination of parental rights is in the child's best interest
- Are there any barriers to adoption?
- Does DSS have an identified adoptive home?
- What, if anything, has DSS done to find an adoptive home?
- Has the child (over 12) said they would consent to adoption?
- Will children be adopted together?

**ANOTHER PLANNED PERMANENT
LIVING ARRANGEMENT
(APPLA)
7B-906.2; 7B-912**

- Defined by federal statute as "any permanent living arrangement that is not enumerated by statute"
- Transitional Living Plan after the following is met:
 1. The child 14 or older, has lived in a family setting for at least 6 months and is integrated there
 2. The child and caregiver agree to continued emotional support
 3. The child and caregiver ask for this living arrangement to be permanent
 4. All other permanency options are deemed to be inappropriate due to the child's long term needs
- court must find 4 conditions before approving APPLA as the primary plan
 1. Child is 16 or 17
 2. DSS has made diligent efforts to place child with a parent or relative or in the guardianship or adoptive placement
 3. Compelling reasons exist that is not in the best interest of the child for #2 not to occur
 4. APPLA is the best permanency plan for the child

**ANOTHER PLANNED PERMANENT
LIVING ARRANGEMENT
(APPLA) cont.**

- Usually consists of child entering into a Contractual Agreement for Residential Services (CARS) with DSS to remain in foster care and receive services
 - coordinated through NC Links
 - child can get assistance with obtaining independent housing
 - child has access to grant funds up to \$5000 for college for up to 4 years through Education Training Voucher Program
 - child gets assistance with job search, vocational training, mental health/substance abuse treatment, and any other life skills training and assistance for self sufficiency
 - Medicaid expanded up to age 21

Final Advice

- ❖ Make any and all objections to evidence and testimony including hearsay objections
 - ❖ Argue that information must be "relevant, reliable and necessary to determine the needs of the child and to determine the best disposition"
- ❖ Attendance at CFTs and other meetings with parent is encouraged
- ❖ Do not be afraid to challenge information in DSS and GAL reports
- ❖ Be careful of agreements and what they really entail
- ❖ Prepare and file a Parent Report when appropriate
- ❖ Have other witnesses to testify to things about your client

Final Advice cont.

- ❖ Remember that the Court cannot just rely on DSS and GAL reports and the Court MUST make his/her own findings
 - ❖ Reports can be incorporated but Court must review them
- ❖ Insist that language in orders is not just standard language but case specific
- ❖ Always propose concurrent or alternate plans in permanency planning hearings
- ❖ Insist on appropriate timing of review hearings
- ❖ Insist on findings of fact that truly show parent's progress and be mindful of the wording of conclusions of law

QUESTIONS

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**Presentation Adapted from Prior Parent Defender Training

DIRECT AND CROSS EXAMINATION

**THE ART AND SCIENCE OF
EXAMINATION OF
WITNESSES**

Seth A. Blum, Esq.
Parent Defender Training
March 7, 2018
Stolen entirely from Thomas Innes, Esq.

**Telling the Story through the
witnesses**

**TELLING THE STORY
THROUGH THE WITNESSES...**

Methods of telling story...

- ☐ Direct Examination
- ☐ Cross Examination
- ☐ Re-Direct

Direct Examination

Where do I begin?

- ☐ Determine the purpose of the witness
- ☐ Create a list of Answers you need
- ☐ Create a list of Questions
- ☐ Separate Good and Bad facts
- ☐ Consider advanced techniques

Science vs. Art

Tools versus nuance

The image contains two icons: a microscope on the left and a paint palette with a brush on the right.

Direct Examination

GOALS OF DIRECT EXAMINATION

- To place undisputed facts on the record and in the judge's/jurors' minds
- To elicit undisputed facts to establish an element of your case
- Put forth your version of the disputed facts
- Persuasively put forward disputed facts in a way to establish them

THE SCIENCE

- ☐ Importance
- ☐ Burden
- ☐ Who is the star?
- ☐ Storytelling
- ☐ You not there
- ☐ More difficult...more stress give up control

USE OF NON-LEADING QUESTIONS

- Whether a question is non-leading is frequently an issue of tone or delivery
- Does question control the witness' response?

- Who?**
- What?**
- Where?**
- When**
- Why?**
- How?**
- Describe?**
- Tell Me?**
- Discuss?**

COMMAND WORDS

- Show
- Explain
- List
- Name
- Relate
- Clarify
- Count
- Add
- Subtract
- Summarize
- Compare
- Estimate
- Define
- Remind

Narrowing and Broadening

- Broadening question form:
Reporter words
- Narrowing question form:
Questions beginning with verbs
- Narrowest Question form:
Leading Questions

- Who?**
- What?**
- Where?**
- When**
- Why?**
- How?**
- Describe?**
- Tell Me?**
- Discuss?**

DRILL TIME!

THE ART...
Of Direct Examination....

Organization

- ▣ Credit the witness...
- ▣ Set the scene...
- ▣ Roll the action...
- ▣ End on HIGH NOTE!

Primacy & Recency

Wasting Critical Opportunities



The Art of Direct

- ▣ 1. Primacy and Recency
- ▣ 2. Looping
- ▣ 3. Headlines/Transitions
- ▣ 4. Word Choices
- ▣ 5. Themes
- ▣ 6 Transitions
- ▣ 7. Explaining terms
- ▣ 8. Positioning

Advanced Techniques

- ▣ Using Headlines
- ▣ Looping
- ▣ Refresh Witness Memory
- ▣ Use Exhibits

Looping

- ▣ ...takes the answer and loops or incorporates into next question
- ▣ Creates a thread...
- ▣ Repeats fact for jury to remember....

- ▣ DANGER!

What to exclude...



LAST QUESTION

- ❑ NEVER END with a leading Question
- ❑ NEVER END with a question that will elicit an objection...
- ❑ ALWAYS END eliciting an answer the jury will remember...
- ❑ ALWAYS end with a bang...Burning Benjamins

YOUR DIRECT EXAMINATION CHECK LIST

1. Are all your questions non-leading?
2. Did you avoid asking questions that call for narrative answers?
3. Did you avoid speculative testimony?
4. Did you avoid asking a witness for an opinion she is not qualified to give?
5. Are you prepared to refresh your witness' recollection if necessary?

IT'S ALL ABOUT THE PREP





Preparing the Witness

1. Explain what will happen
2. Go over goals
3. Ask questions - hear the answers
4. Improve the answers
5. Prepare witness for cross-examination

CROSS EXAMINATION....

Science vs. Art

Tools versus nuance



WIGMORE



Control

▣ More control, more you meet your goals



Method of Control

- ▣ Leading
- ▣ Length of questions
- ▣ Closed end
- ▣ No reporter Qs
- ▣ No whys
- ▣ Build a cadence, a rhythm
- ▣ One fact per question
- ▣ Build on each question
- ▣ Baby steps
- ▣ No descriptive/weasel words

The “Non-Question” Question

- All leading
- Raise voice at end
- No interrogatory at end
- Witness obviously agreeing with you
- Makes questions shorter
- Makes question and answer more understandable
- Avoids problem of double negatives
- How people talk in real life

DRILL TIME TAKE 2

What am I wearing?



**CONSTRUCTIVE
CROSS**



YOUR FIRST CONSIDERATIONS

- Do you want or need to cross examine this witness?
- What do you want out of this witness?
- Does this witness hurt you and your theory?
- Can this witness help you somehow?
- What am I going to say about this witness in closing?

FOCUS ON GOALS

- ☐ *Credit your case by eliciting helpful info
- ☐ *Credit your witnesses
- ☐ *Minimize the harm from direct
- ☐ *Show limit of witness & the testimony
- ☐ *Undermine direct
- ☐ *Demonstrate problems in perception/interpretation/memory/judgment/reasoning/bias

Planning and Organizing Cross

- ☐ How does this witness see him or herself?
- ☐ How does witness want to be seen?
- ☐ BEST: Don't fight witness' tendencies

The Art...

Cross Examination

- ▣ Focus
- ▣ Style
- ▣ Control

Every Cross has two questions...

?

First Question

Last Question

- ▣ Again, end with a bang
- ▣ Try to end with a YES!
- ▣ Try not to end with an objection, unless ITS WORTH IT!

Style

- ▣ * Your tone
- ▣ * Your assertiveness
- ▣ *Build a rhythm
- ▣ * "Cross"?

The Science...

Style Points

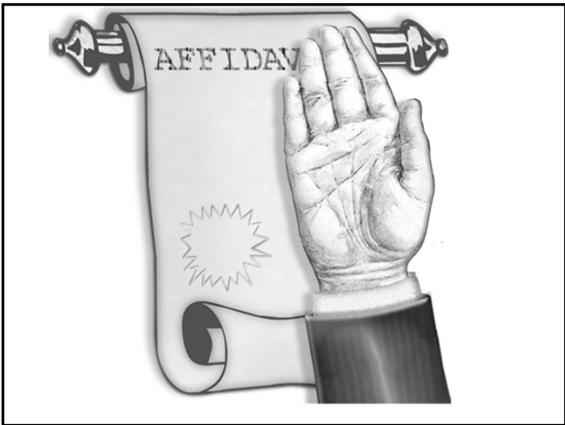
Primacy/Recency=Currency

10 Commandments of Cross
Courtesy of Prof. Irvin Younger

- I. Be Brief
- II. Use Plain Words
- III. Leading—only leading
- IV. Be prepared
- V. Listen
- VI. Don't quarrel
- VII. Avoid Repetition
- VIII. DON'T allow witness to explain
- IX. Limit by how you ask the question
- X. Save ultimate points for closing

THE BEST CROSS EXAMINATION QUESTIONS

1. Do you have the witness's own words in a writing?



2. Do you have highly credible contradictory evidence?



3. Do you have an area where this witness is not credible if he disagrees?



How to Get Witness to Answer Questions

- ▣ Repeat the question
- ▣ Repeat the question “yes or no”
- ▣ Answer my question, thank you
- ▣ So the answer is Yes, isn't it?
- ▣ Get it out of system?
- ▣ Make 'Em happy then , repeat Q
- ▣ Please tell the jury....

ASK FOR HELP?

Re-Direct Examination

First and all important question:

- DO I NEED TO DO THIS?

When to re-direct

TWO RULES AND TWO RULES ONLY:

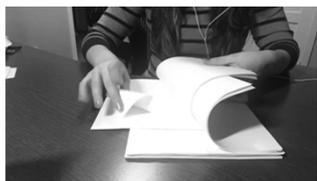
- ▣ ONLY WHEN NEEDED
- ▣ ABSOLUTELY ONLY WHEN WITNESS IS PREPPED and READY

Purpose of Re-Direct

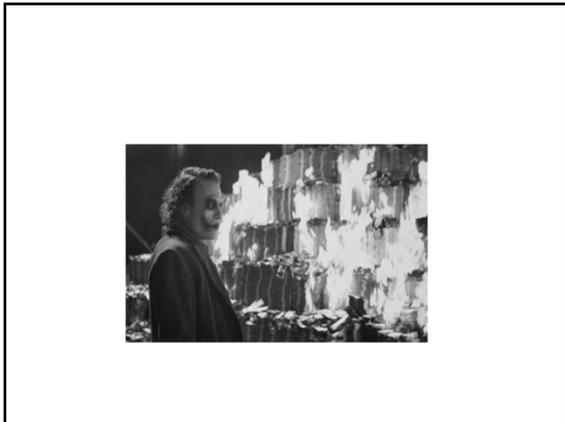
- Explanation
- Clarification
- Response
- Rehabilitation
- Prior Consistent Statement
- Sandbagging?

RULES OF RE-DIRECT

- ☐ Only when Needed
- ☐ Within Scope of Cross
- ☐ Form of Direct Exam Qs Apply
- ☐ Need Proper Foundation for Recollection Refreshing
- ☐ Remember Re-Cross is available
- ☐ *Ask to Re-open Direct?



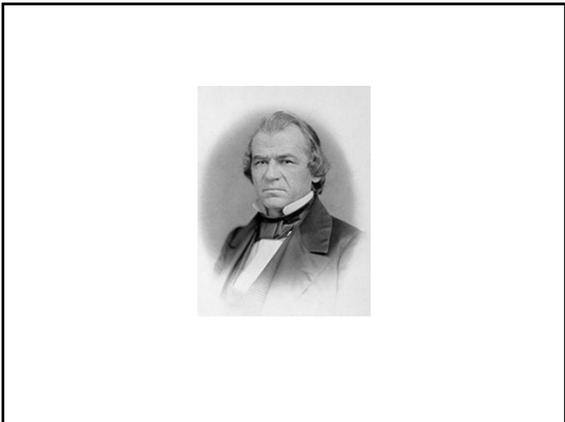
Last thing don't do the shuffle... Stop before last line, ask co-counsel, then end on a high note and sit down...



Common Bad Habits on Cross...

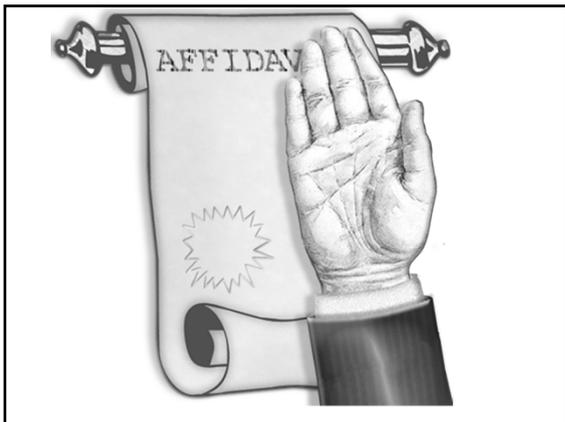
- ❑ Saying "thank you", "ok", "sure"
- ❑ Nodding your head
- ❑ Repeating the answer
- ❑ Acting surprised or shocked
- ❑ Checking things off a notepad
- ❑ Taking long pauses
- ❑ Studying your notes
- ❑ Walking around the ctrm for no reason





**IMPEACHMENT & PAST
RECOLLECTIONS...**

**1. Do you have the witness's
own words in a writing?**



Four C's

- Commit
- Credit
- Confront
- Control

Commit

Two Approaches

A black and white photograph of a person standing at the beginning of a path that splits into two directions. The person is looking down the path, symbolizing a choice or commitment.

Credit



Motive and Ability to be Truthful

- ❑ Motivated to tell the truth
- ❑ Importance of report /duty to maker report
- ❑ Freshness of memory and statement
- ❑ Expertise in making the report

Confront



Control



- ▣ Ask leading questions
- ▣ Show the document
- ▣ Have witness read the exact words to themselves
- ▣ You read the statement loud (using exact words)

No need to be....



After Impeaching, don't ever ask witness...

- ❑ Are you lying now or were you lying then?
- ❑ Which is the truth?
- ❑ That statement contradicts what you just said, right?
- ❑ You're having trouble keeping your story straight, right?





TAKE YOUR LEAVE!

BEAT  FEET

Should you impeach?

For Example...



What is Your Theory of Impeachment?

- Is the first statement true?
- Is witness lying?
- Is witness mistaken?



"Perhaps you would like to rephrase your last answer."

Where are YOU?

- Get to the witness stand
- Stay at the witness stand



Impeachment by Omission

- ❑ Should it be there but it ain't?
- ❑ Crediting even more important
- ❑ Duty to Speak?
- ❑ Inclination to Speak?
- ❑ Opportunity to Speak?

Impeachment by Bias

- ❑ Relation to Party/personal interest
- ❑ Business/pecuniary interest
- ❑ Motivation

Witness Characteristics

- ❑ Other crimes
- ❑ Dishonest acts
- ❑ Psychological Issues
- ❑ Impaired Perception
- ❑ Drug/alcohol issues

Past Recollections...



Refreshing Recollections...

1. Show that the witness' memory is exhausted.
2. Determine that her memory might be refreshed by....
3. Show the refreshing material to the witness
4. Give the witness time to review
5. Take the material away and ask the witness to continue her testimony

What can be used to refresh?

ANYTHING

Recorded Recollection as Evidence

- ▣ Federal Rule 803 (5)

- ▣ Four elements required:
 - The witness once had personal knowledge of the relevant facts or events;
 - The witness cannot currently recall the events fully and accurately;
 - The witness previously made an accurate record of the event;
 - Record made at a time when the events were fresh in her memory...

CONSTRUCTIVE CROSS



North Carolina Defender Trial School
Sponsored by the UNC School of Government and
North Carolina Office of Indigent Defense Services
Chapel Hill, NC

Impeachment

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I. Some General Principles for Impeachment

A. Plan Your Impeachment

1. Make sure you have done a complete investigation and have obtained all discovery and Brady/Kyles materials before trial. Remember -- the U.S. Supreme Court has explicitly held that anything in the State's possession that can be used to impeach a State's witness must be disclosed under Brady. This applies even if the impeachment material does not in any way exculpate the defendant. As long as it can be used to impeach, contradict, or discredit a prosecution witness, it is Brady material.

2. Before the witness takes the stand, you should know what information you have about the witness's convictions, bad acts, and bad character that you can use to impeach. Plan this impeachment in advance. Write out the questions in advance, if necessary.

3. Before the witness takes the stand, you should know what information you have about the witness's biases and interests in the case that you can use to impeach. Plan this impeachment in advance. Write out the questions in advance, if necessary.

4. Although you cannot know in advance what the witness will say on direct, you must know in advance exactly what prior testimony and statements the witness has made. Make sure you are completely familiar with all of these prior statements, so if the witness testifies to something inconsistent, you are ready to impeach.

5. Be familiar with your theory of defense. That way you will know if you should be doing an impeachment. If the witness testifies to something inconsistent with a prior statement, only use the prior statement to impeach if the prior statement is more favorable to your theory of defense than the statement the witness just made on direct.

B. Never Ask an Impeaching Question That Calls For an Opinion or Explanation

C. Keep Your Questions Short and Simple

1. No multi-sentence questions.
2. No questions with a long preface or "wind up."
3. Use normal, clear language – no lawyer talk, no cop talk.
4. Don't be a wise ass. Let the impeachment material stand for itself.

E. The Ethics of Cross-Examination

1. You must have a good faith basis for every impeaching question you ask.
2. It is unethical to insert innuendo based on untrue facts.

3. It is unethical to ask accusatory questions for the purpose of embarrassing or rattling a witness if the answer to the question is irrelevant to the case at hand.

EX: The witness has a son who is in prison for child abuse. Unless this is somehow relevant to your case, it is improper to cross-examine the witness about this just for the purpose of embarrassing him or getting him to lose his temper on the stand.

F. Stop When You Are Done

1. Don't ask one too many questions.

2. If the witness refuses to answer the impeaching question, don't rush in with another question. Every moment of silence just emphasizes that the witness is stuck.

3. Resist the urge to ask the conclusory question after the witness has been impeached. Save the conclusions about the witness for your closing argument.

II. Impeachment With Prior Inconsistent Statements

A. Know the Witness's Prior Statements Inside Out Before You Reach Trial

B. Listen Carefully to the Witness's Answers on Direct. If you Don't Remember What He Said on Direct, You Won't Know If He Can Be Impeached

C. There is a formula for impeaching someone with a prior inconsistent statement. If you follow the simple formula in asking impeachment questions, you can't go wrong.

D. The Formula For Impeachment By Prior Inconsistent Statement

1. Get the witness to repeat the statement he just made at trial

2. Ask the witness if he made a prior statement (Don't ask about the substance of that prior statement, just about whether he made one – you will get to the substance in a minute)

3. Mark the prior statement for identification (don't try to introduce it into evidence yet).

4. Confront the witness with the substance of the prior statement and ask the witness if he made that statement.

a. If the witness admits making the prior statement, stop there. You have established the inconsistency and are not allowed to actually introduce the prior statement in evidence – the inconsistency is already before the jury. [Under North Carolina law, you also may be able to offer the statement itself into evidence if it bears on a material fact in the case, but you are not required to do so.]

b. If the witness denies making the prior statement, move to have the statement admitted into evidence as a prior inconsistent statement. Then read it to the jury or have the witness read it aloud to the jury. [Under North Carolina law, you are not bound by the witness's denial and may introduce extrinsic evidence of the statement (e.g., the statement itself or testimony by another witness about the statement) if the statement bears on a material fact in the case or goes to bias. You may need to call another witness to authenticate a written statement that is not self-authenticating—for example, a letter or other written statement by the witness may require additional testimony to authenticate it.]

5. *Do NOT give the witness a chance to explain the inconsistency.*

EXAMPLE: At a preliminary hearing, the witness testified that the light was green. At trial, he testified on direct examination that the light was red. Here's how to impeach.

NOTE: Which is better for your theory of defense, a green light or a red light? If a red light is better, DON'T IMPEACH. If, on the other hand, a green light is better, use the preliminary hearing transcript to impeach the witness.

1. Q: Did you testify on direct examination that the light was red?

A: Yes.

2. Q: Do you remember testifying at a preliminary hearing on March 15th of this year?

A: Yes.

Defense counsel then marks the relevant lines of the preliminary hearing for identification.

3. Q: And at that preliminary hearing do you remember being asked the following question and giving the following answer? "Question: 'What color was the light?' Answer: 'Green'"

A: Yes

Stop Here. The Witness Has Acknowledged the Inconsistency, and is Impeached

OR

A: No.

*Now Offer the Relevant Lines of the Preliminary Hearing Transcript Into Evidence
Then Read Them to the Jury, or Have the Witness Read Them to the Jury*

NOTE: Do not offer the entire transcript into evidence:

- a. Everything except the inconsistent statement is both irrelevant and hearsay.
- b. It probably contains a lot of other stuff that you don't want the jury seeing.

APPEALS

**APPEALS IN ABUSE, NEGLECT AND DEPENDENCY
AND TERMINATION OF PARENTAL RIGHTS ACTIONS**

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<http://www.ncids.org/ParentRepresentation/index.html>



NOTICE OF APPEAL CHECKLIST

1. BEFORE APPEALING

- Is this order appealable under 7B-1001(a)?
- ALWAYS file a Notice to Preserve the Right to Appeal any order ceasing reunification.
- Does the client understand that he/she is subject to having to reimburse the state for attorneys' fees? (More information is found on the back of the Affidavit of Indigency form.)
- Have you explained to the client that there is no new hearing on appeal?

2. PREPARING THE NOTICE OF APPEAL

- Choose the sample notice of appeal from our website that matches the type of order you are appealing. If you're unsure, contact our office. (Using the **wrong form** could result in **dismissal** of the appeal!)
- Obtain the client's signature. (Do NOT file it without the client's signature.)
- Send an appeal notification form (IDS-030), copy of the order and notice of appeal, to our office.
- Prepare a certificate of service.

3. FILING THE NOTICE OF APPEAL

- File the notice of appeal with the Juvenile Clerk in your county **no later than 30 days** from the date the order was filed. [You'll need a separate notice of appeal for any order that ceased reunification efforts!]
- Serve the notice of appeal on all counsel and *pro se* parties (including guardians).
- If you haven't notified the Office of the Parent Defender, do so now.

4. AFTER FILING THE NOTICE OF APPEAL

- Follow up with our office if you don't receive an email within one week assigning appellate counsel.
- Complete and return the information sheet that is sent to you.
- Assist appellate counsel as requested.
- Keep appellate counsel updated on any trial level developments.

A more detailed document entitled, "**MY CLIENT WANTS TO APPEAL, NOW WHAT DO I DO?**" is available on our website under "How To Appeal":

<http://www.ncids.org/ParentRepresentation/Forms/TrialLevelForms/TrialFormsLinks.htm>

CHANGES TO APPEALS FILED AFTER JANUARY 1, 2019

I. ALWAYS file a Notice to Preserve the Right to Appeal for any order eliminating reunification.

- In writing
- Within 30 days from the entry (filed stamped date) of the order
- Does NOT need your client's signature
- If you represent a guardian or custodian, skip the Notice to Preserve and file a Notice of Appeal instead (same as before).

II. If no TPR petition or motion is filed within 65 days from entry of the order eliminating reunification and you filed a Notice to Preserve (see I above), file a Notice of Appeal.

- In writing
- Within 30 days from the 65 days from entry (filed stamped date)
- Don't add days for service (check with us on your deadline!)
- Must have both the client's and your signature

III. If TPR is filed and granted, file TWO Notices of Appeal.

- In writing
- Within 30 days from the entry (filed stamped date) of the order
- One Notice of Appeal directed to the Supreme Court of the TPR Order
- One Notice of Appeal directed to the Supreme Court of the order eliminating reunification
- File TWO SEPARATE Notices of Appeal!
- Must have both the client's and your signature

Don't forget to complete Certificates of Service for each document (and don't serve by courthouse mailbox!).

§ 7B-1001. Right to appeal. – Effective January 1, 2019

(a) In a juvenile matter under this Subchapter, appeal of a final order of the court shall be made directly to the Court of Appeals. Only the following juvenile matters may be appealed:

- (1) Any order finding absence of jurisdiction.
- (2) Any order, including the involuntary dismissal of a petition, which in effect determines the action and prevents a judgment from which appeal might be taken.
- (3) Any initial order of disposition and the adjudication order upon which it is based.
- (4) Any order, other than a nonsecure custody order, that changes legal custody of a juvenile.
- (5) An order under G.S. 7B-906.2(b) **eliminating reunification**, as defined by G.S. 7B-101(18b), as a permanent plan by either of the following:
 - a. A parent who is a party and:
 1. Has **preserved** the right to appeal the order **in writing** within 30 days after entry and service of the order.
 2. A termination of parental rights petition or motion has not been filed within **65 days** of entry and service of the order.
 3. A notice of appeal of the order eliminating reunification is filed within 30 days after the expiration of the 65 days.
 - b. A party who is a guardian or custodian with whom reunification is not a permanent plan.

(a1) In a juvenile matter under this Subchapter, appeal of a final order of the court shall be made directly to the Supreme Court in the following juvenile matters:

- (1) Any order that terminates parental rights or denies a petition or motion to terminate parental rights.
- (2) An order eliminating reunification as a permanent plan under G.S. 7B-906.2(b), if all of the following conditions are satisfied:
 - a. The right to appeal the order eliminating reunification has been preserved in writing within 30 days of entry and service of the order.
 - b. A motion or petition to terminate the parent's rights is filed within 65 days of entry and service of the order eliminating reunification and both of the following occur:
 1. The motion or petition to terminate rights is heard and granted.
 2. The order terminating parental rights is appealed in a proper and timely manner.

c. A separate notice of appeal of the order eliminating reunification is filed within 30 days after entry and service of a termination of parental rights order.

(a2) In an appeal filed pursuant to subdivision (a1)(2) of this section, the Supreme Court shall review the order eliminating reunification together with an appeal of the order terminating parental rights. If the order eliminating reunification is vacated or reversed, the order terminating parental rights shall be vacated.

(b) Notice of appeal and notice to preserve the right to appeal shall be given in writing by a proper party as defined in G.S. 7B-1002 and shall be made within 30 days after entry and service of the order in accordance with G.S. 1A-1, Rule 58.

(c) Notice of appeal shall be signed by both the appealing party and counsel for the appealing party, if any. In the case of an appeal by a juvenile, notice of appeal shall be signed by the guardian ad litem attorney advocate.