# Giving Testimony

Second Judicial District CASA Program

In-Service Training, June 20, 2019

## Fact-Finding in General

**Fact-Finding**: the act or process of determining the facts in a case and applying these facts to the correct legal standard in order to reach a decision.

- Trial, but without a jury
- Adjudicatory hearing

A trial is not the same thing as a hearing.

- Standards of proof
- Rules of evidence
- Testimony

## Fact-Finding in General

Fact-finding is an adversarial process.

- The judge doesn't interview witnesses, do home visits, talk with the children, etc.
- Instead, the judge relies on attorneys for each side to present their cases thoroughly and efficiently.
- This means attorneys are gatekeepers responsible for presenting only the information that is true, relevant, and admissible.
- But they also have to present evidence that will be the most persuasive to the court.
- Rules of evidence are designed to guarantee the fairness of the fact-finding process.

## Fact-Finding in General

The judge is the fact-finder in a child protection case.

- Trial is not about convincing the judge what the law is.
- Trial is about convincing the judge what the facts are. . .
- . . . and then arguing how the judge should apply the law to those facts.

## Fact-Finding in General

What can the judge hear at fact-finding?

1. Personal observations of witnesses
2. Expert opinions
3. Argument of counsel about what the legal conclusions should be in light of the facts and opinions presented

Where does a GAL's report fit into this paradigm?

## Roles of a GAL at Fact-Finding

You're not an expert witness.

. . . at least not solely by virtue of being a GAL . . .

You are a court-ordered investigator specifically empowered to investigate the circumstances of the case, the child, and the parents and make appropriate recommendations to the court.

You may be a fact witness in some cases.

You have a responsibility to advocate for what is in the best interests of the child.

## Basic Rules of Evidence

What can the judge hear at fact-finding?

1. Personal observations of witnesses
2. Expert opinions
3. GAL's recommendations
4. Argument of counsel about what the legal conclusions should be in light of the facts and opinions presented

The judge can't hear second-hand information, things the witness learned from someone else, except under particular limited circumstances.

## Basic Rules of Evidence

What's wrong with second-hand information?

- It's prone to intentional or unintentional corruption.
- It can't be cross-examined – attorneys can't ask additional questions about source of knowledge, possible additional meanings, etc.

Of course, we're talking about **hearsay**: any statement made by someone other than the witness testifying on the stand offered as proof of what the statement says.

Most of your report is composed of hearsay, and your recommendations are largely based on hearsay too.

## Basic Rules of Evidence

The most important thing you need to know about hearsay:

**Let the attorneys worry about hearsay.**

A statement is only inadmissible if opposing counsel objects.

There might be valid strategic reasons why opposing counsel might not object when you offer hearsay.

## Basic Rules of Evidence

The one exception to the hearsay rule you do need to know:

Statements by a party-opponent are not objectionable just because they're hearsay.

You need to know that because it affects how you handle your investigation.

- A parent's own statements can often be the best evidence against them.
- Make sure your documentation of conversations with parents is very thorough.
- This doesn't just apply to parents, however. . . .

## Hearsay Strategies

Just state facts, no matter where you heard them.

Omit attributive modifiers.

- "The chemical dependency counselor told me . . . "
- "I heard from a neighbor that . . . "
- "Mom told me . . . " is not inadmissible hearsay, because it's a statement by a party-opponent.

Don't telegraph the hearsay.

- "I don't know if I'm allowed to say this, because it's hearsay . . . " will almost certainly draw an objection.

## Handling Objections

Hearsay is not the only basis upon which an attorney might object during your testimony.

Sometimes the question you were asked might be objectionable.

- "What do you think will happen if the children are returned home" is objectionable because it's asking the witness to speculate.
- The judge will usually give the examining attorney a chance to rephrase the question.

Sometimes the answer you give might be objectionable.

## Handling Objections

If there's an objection to the question, don't start answering until the judge has ruled on the objection.

- They may overrule the objection and allow you to answer.
- They might sustain the objection but allow the attorney to rephrase the question.
- They might sustain the objection and order the attorney to move on to something else.
- Or the attorney may just withdraw the question.

## Handling Objections

If there's an objection to your answer, you need to understand what was objectionable.

- Relevance, though this can be very subjective.
- Non-responsive, where the answer isn't actually an answer to the exact question that was asked.
- Lacks foundation, in which case the examining attorney may have to backtrack and ask additional questions to lay a proper basis for how you come to know the information you're about to give.
- Hearsay
- Lay witness opinion
- Speculation

## Handling Objections

Some attorneys are more aggressive than others and will engage with every tiny detail of every procedural rule.

Many attorneys keep their objections to a minimum during a fact-finding (as opposed to a jury trial), because judges tend to have faith in their own ability to determine what evidence is admissible.

Some attorneys will object a lot to throw you off your rhythm, especially if they don't like what you're going to say.

## Handling Objections

Preparation can go a long way toward keeping your evidence admissible.

Practicing your answers to anticipated questions can increase your comfort level with what you're going to say.

Above all, stay calm. And breathe.

- None of the shenanigans in the courtroom are personal.
- Your testimony isn't personal either.
- You're the one with the facts.

## Preparing for Fact-finding

The first three things you need to know to prepare for trial:

1. What are the questions the judge has to find answers to?

2. What information do I have to provide relevant to answering those questions?

3. Who is most likely to call me as a witness?

## Preparing for Fact-finding

1. What are the questions the judge has to find answers to?

This will come from the appropriate statute for the type of action that is being heard.

So you should always start with the statute that applies to the type of fact-finding you're preparing for.

## Preparing for Fact-Finding

Pop Quiz: Fact-Finding or Not?

Shelter Care Hearing
Pretrial Conference
Motion Hearing
Adjudicatory Hearing
Case Plan Hearing
Status Hearing
Review Hearing
Permanency Hearing
Termination Hearing

## Preparing for Fact-finding

Shelter Care Hearing: I.C. 16-1615

(5) If, upon the completion of the shelter care hearing, it is shown that:

- (a) A petition has been filed; and
- (b) There is **reasonable cause** to believe the child comes within the jurisdiction of the court under this chapter and either:
  - (i) The department made reasonable efforts to eliminate the need for shelter care but the efforts were unsuccessful; or
  - (ii) The department made reasonable efforts to eliminate the need for shelter care but was not able to safely provide preventive services; and
- (c) The child could not be placed in the temporary sole custody of a parent having joint legal or physical custody; and
- (d) It is contrary to the welfare of the child to remain in the home; and
- (e) It is in the best interests of the child to remain in temporary shelter care pending the conclusion of the adjudicatory hearing.

The court shall issue . . . a shelter care order placing the child in the temporary legal custody of the department. . . .

## Preparing for Fact-finding

"Within the jurisdiction of the court" (I.C. 16-1603)

(1) Except as otherwise provided herein, the court shall have exclusive original jurisdiction in all proceedings under this chapter concerning any child living or found within the state:

- (a) Who is neglected, abused or abandoned by his parents, guardian or other legal custodian, or who is homeless; or
- (b) Whose parents or other legal custodian fails to provide a stable home environment.

(2) If the court has taken jurisdiction over a child under subsection (1) of this section, it may take jurisdiction over another child living or having custodial visitation in the same household without the filing of a separate petition if it finds all of the following:

- (a) The other child is living or is found within the state;
- (b) The other child has been exposed to or is at risk of being a victim of abuse, neglect or abandonment;
- (c) The other child is listed in the petition or amended petition;
- (d) The parents or legal guardians of the other child have notice . . .

## Preparing for Fact-finding

Adjudicatory Hearing: I.C. 16-1619

(4) If a **preponderance of the evidence** at the adjudicatory hearing shows that the child comes within the court's jurisdiction under this chapter upon the grounds set forth in section 16-1603, Idaho Code, the court shall so decree and in its decree shall make a finding on the record of the facts and conclusions of law upon which it exercises jurisdiction over the child.

## Preparing for Fact-finding

Adjudicatory Hearing: I.C. 16-1619 (cont'd.)

If the child is found to be "within the court's jurisdiction," the court will have to make other findings and decisions regarding:

- Protective supervision or out-of-home placement? (I.C. 16-1619(5))
- Reasonable efforts to prevent removal? (I.C. 16-1619(6))
- Indian child? (I.C. 16-1619(7)(a)))
- Educational stability? (I.C. 16-1619(7)(b)(i))
- Sibling placement? (I.C. 16-1619(7)(b)(ii))
- Psychotropic medications? (I.C. 16-1619(7)(c))

## Preparing for Fact-finding

Termination Hearing: I.C. 16-2005

(1) The court may grant an order terminating the relationship where it finds that termination of parental rights is in the best interests of the child and that one (1) or more of the following conditions exist:

- (a) The parent has abandoned the child.
- (b) The parent has neglected or abused the child.
- (c) The presumptive parent is not the biological parent of the child.
- (d) The parent is unable to discharge parental responsibilities and such inability will continue for a prolonged indeterminate period and will be injurious to the health, morals or well-being of the child.
- (e) The parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority.

## Preparing for Fact-finding

Termination Hearing: I.C. 16-2005 (cont'd.)

(2) The court may grant an order terminating the relationship and may rebuttably presume that such termination of parental rights is in the best interests of the child where:

- (a) The parent caused the child to be conceived as a result of rape, incest, lewd conduct with a minor child under the age of sixteen (16) years, or sexual abuse of a child . . .;
- (b) The following circumstances are present:
  - (i) Abandonment, chronic abuse or chronic neglect of the child. . . ;
  - (ii) Sexual abuse against a child of the parent. . . ;
  - (iii) Torture of a child, any [aggravated offense requiring sex offender registration, I.C.18-8303], battery or an injury to a child that results in serious or great bodily injury to a child; voluntary manslaughter of a child, or [aiding or abetting, soliciting, attempting, or conspiring to commit such voluntary manslaughter];
  - (iv) The parent has committed murder, aided or abetted a murder, solicited a murder or attempted or conspired to commit murder; or
- (c) The court determines the child to be an abandoned infant, except in a parental termination action brought by one (1) parent against another parent.

## Preparing for Fact-finding

Termination Hearing: standards (I.C. 16-2009)

The court's finding with respect to grounds for termination shall be based upon **clear and convincing evidence** under rules applicable to the trial of civil causes, provided that relevant and material information of any nature, including that contained in reports, studies or examinations, may be admitted and relied upon to the extent of its probative value. When information contained in a report, study or examination is admitted in evidence, the person making such report, study or examination shall be subject to both direct and cross-examination.

## Preparing for Fact-finding

The first three things you need to know to prepare for trial:

1. What are the questions the judge has to find answers to? ✓

2. What information do I have to provide relevant to answering those questions?

3. Who is most likely to call me as a witness?

## Preparing for Fact-finding

2. What information do I have to provide relevant to answering those questions?

Once you know what has to be proved, you can match the information you have to the elements at issue.

This is going to be fact-specific, to a degree – every case is different, but there are patterns we see over and over.

## Preparing for Fact-finding

Remember that evidence must be relevant.

- If it doesn't relate to one of the elements that has to be proved during the fact-finding, it shouldn't be presented.
- Over the life of a case, you will have accumulated a lot of information in your reports, but not all of it will add anything to the judge's understanding of the questions at fact-finding.

In many cases, it might help to make a timeline of events, both leading up to and during the case.

- Include placements, services, behaviors of the parents
- A timeline helps you think about the case in a linear manner.
- You can use it at trial for refreshing your memory if you forget.

## Preparing for Fact-finding

Adjudicatory Hearing example: I.C. 16-1619(4)

- Is the child within the court's jurisdiction?
  - I.C. 16-1603(1)(a): Child is neglected, abused or abandoned by his parents, guardian or other legal custodian, or is homeless; or
  - I.C. 16-1603(1)(b): Child whose parents or other legal custodian fail to provide a stable home environment; or
  - I.C. 16-1603(2): The court has taken jurisdiction over a child under one of the above, and this is another child living or having custodial visitation in the same household, and the court finds all of the following:
    - (a) The other child is living or is found within the state;
    - (b) The other child has been exposed to or is at risk of being a victim of abuse, neglect or abandonment;
    - (c) The other child is listed in the petition or amended petition;
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## Preparing for Fact-finding

Adjudicatory Hearing example (cont'd.)

If the child is within the court's jurisdiction:

- Protective supervision or out-of-home placement? (I.C. 16-1619(5))
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## Preparing for Fact-finding

Termination Hearing example: I.C. 16-2005(1)(d)

- Termination is in the best interests of the child and:
- the parent is unable to discharge parental responsibilities and
- such inability will continue for a prolonged indeterminate period and
- [such inability] will be injurious to the health, morals or well-being of the child.

## Preparing for Fact-finding

The first three things you need to know to prepare for trial:

1. What are the questions the judge has to find answers to? ✓

2. What information do I have to provide relevant to answering those questions? ✓

3. Who is most likely to call me as a witness?

## Preparing for Fact-finding

3. Who is most likely to call me as a witness?

One of three possibilities:

- The state may call you as a "friendly" witness to support their case.
- A parent's attorney may call you to discredit your report and/or recommendation.
- Your attorney might call you on your request.

You'll have to prepare to deliver your information and recommendations no matter which happens.

## Preparing for Fact-finding

The state's attorney will always present their evidence first, because the state has the burden of proof.

- The state has to establish all of the elements necessary at adjudication or termination.
- If the court doesn't find each of the elements, the court can't make the appropriate findings and conclusions, and the petition could be dismissed.

So if the state calls you during its case in chief, it will be:

- To testify to facts that only you know (such as admissions made to you by a parent)
- To get in evidence at termination that wouldn't be admissible if offered by another witness (I.C. 16-2009)
- To bolster the state's recommendations by your own similar ones

## Preparing for Fact-finding

If you're called during the state's case in chief, the questioning will not be adversarial, as a rule.

- The state's attorney will probably ask you a mix of open and closed questions.
- If there is an objection as to your basis of knowledge of some fact, the state's attorney will usually help you clarify the foundation so that your evidence will come in.

The one exception to this rule . . .

## Preparing for Fact-finding

When you disagree with some aspect of the department's recommendations, expect the state's questioning may get a little more confrontational.

- Placement
- Sibling placement
- Services

If you disagree with the state on the big question:

- "under the jurisdiction of the court"
- termination

you probably won't be called during the state's case.

## Preparing for Fact-finding

The state may ask you about areas of disagreement with the department for a number of reasons:

- Attorneys are trained to get bad information in front of the court in a controlled manner, on their timetable, to minimize its impact.
- They might ask you about your reasons for disagreement to make it seem like it's not a big deal.
- Or they might ask you about it so they can then ask you follow-up questions to make it look like you're wrong.

The best thing you have going for you is that your recommendations are always based on observable facts and the history of the case, rather than an impersonal policy manual.

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The best thing you have going for you is that your recommendations are always based on observable facts about observable people and the history of the case, rather than an impersonal policy manual.

## Preparing for Fact-finding

If you're called to the stand by the state's attorney, once they are done asking you questions, parents' attorneys will have an opportunity to cross-examine you.

- This is likely to be much more adversarial.
- They'll confine you largely to closed questions without giving you much of an opportunity to explain your answers.

If something seemingly damaging to your case comes out, your attorney will have an opportunity to question you, and then the state's attorney can question you again on redirect, to rehabilitate the damaging thing.

## Preparing for Fact-finding

Once the state has rested its case in chief, the judge will then usually allow one of the parents' attorneys to begin presenting their evidence next.

- If you weren't called as a witness during the state's case, you may be called by mom's or dad's attorney.
- Every judge is different, so your judge may allow you to present next after the state, but in my experience most don't.
- So you need to be ready for that eventuality.
- It's also possible that a parent's attorney can call you to the stand again, even if you testified during the state's case, in order to get into areas that weren't allowed during their original cross-examination.

## Preparing for Fact-finding

If you're called during a parent's case in chief, the attorney will try to limit what you say:

- They will probably stick mostly to closed questions.
- They'll quickly follow up an answer with another question so you don't have a chance to explain the answer you just gave.
- Their questions may get argumentative.
- They may purposefully try to confuse you.

Again, as with cross-examination, your attorney and the state's attorney will have a chance to question you and (hopefully) allow you to give evidence more freely.

## Preparing for Fact-finding

Why does it matter who calls you as a witness?

- You have to be prepared for what sorts of questions you're asked.
- . . . and how they're asked.
- You have to have strategies for handling difficult questions and difficult questioning tactics.
- And you have to have a plan to get in the relevant information that opposing counsel is trying to keep you from saying.

## Strategies for Cross-examination

1. Know the weaknesses in your case.

- Defense counsel should never be able to point to any weakness in your testimony that you yourself haven't thought of first .
- Think about, and practice, how you might answer some of the difficult questions defense counsel will ask you.
- You want to deliver your opinions confidently, while still signaling that you have considered any such weaknesses.
- Be prepared to explain why a particular weakness does not undermine your entire case.

## Strategies for Cross-examination

2. Understand the purposes of cross-examination – "Why are they asking me that?"

- Making you help prove a defense.
- Showing flaws in your investigation.
- Showing flaws in your understanding of the facts or the law.
- Making you admit to some bias or improper motive underlying your opinions.

## Strategies for Cross-examination

3. Don't take any of it personally.

- Defense counsel has an ethical obligation to represent their client to the best of their ability, whether they agree or not, whether they think the client is a good parent or not.
- That means a competent defense attorney will try to shred your case.
- But remember, defense counsel is attacking your work, not you.
- That said, you may encounter bad behavior from defense counsel – but it still isn't personal.
- You also improve your appearance of impartiality when you treat hostile questioning with exactly the same grace and demeanor with which you treat "friendly" questioning.

## Strategies for Cross-examination

4. Listen carefully to the question and answer only what is being asked.

- If it's a yes/no question, give a yes/no answer.
- Don't volunteer information outside of a direct response to the question.
- If there is something you need to explain further than the question allows, you'll have a chance, either during follow-up cross or on redirect or questioning by a more "friendly" attorney.

## Strategies for Cross-examination

5. Repeat your direct examination testimony as much as possible.

- Stick to your talking points.
- Defense counsel will always want you to admit to something you might not want to say.
- If you begin every response with, "As I said earlier . . . " you win.

## Strategies for Cross-examination

6. Don't be afraid of the hard questions.

- "Madame guardian, won't little Johnny be harmed by having his parental relationship with mom permanently severed?"
- "Yes."
- "Of course, but unfortunately in this case, that's outweighed by the harm caused by remaining in limbo with a parent who may never be able to provide a safe and stable home."
- It demonstrates that you have soberly and carefully considered every alternative before reaching the unfortunate conclusion, with due regard for what is in the child's best interests.

## Strategies for Cross-examination

7. Don't brainstorm.

- The witness stand is not the place to be thinking about what you or the department or anyone else could have done differently.
- If defense counsel's questions put you into that mindset, they're trying to get you to blow your own case by shifting the blame for a parent's failure to get it together onto you or onto the caseworker.
- "I understand the question, but I'm here to report on what happened, not to speculate about what could have happened."

## Strategies for Cross-examination

8. Remember that you will always get another chance to rehabilitate an unhelpful answer.

- Whether on redirect or during questioning during your own case in chief.
- You may want to remind your attorney to explore a particular line of questioning to make sure the better version of your answer comes into evidence.
- As a last resort when you're being completely boxed in: "Judge, may I explain?"

## General Rules for Witnesses

1. Appear and behave professionally.

- This applies both on and off the witness stand.
- Dress on the conservative side; avoid flashy colors or distracting jewelry.
- Know what you are going to do with your hands.
- Don't take your file up to the stand with you.
- Don't allow yourself to become frustrated or combative (no matter what defense counsel says or does).

## General Rules for Witnesses

2. Present your affirmative position in a confident, straightforward manner.

- Testimony is not an academic exercise; it's advocacy.
- If you feel you have done the work and you are satisfied with your recommendations, you do yourself a disservice by appearing otherwise.
- Give your answers out loud; nods or gestures are not recorded.
- Speak clearly in the right position to be captured by the recording system.
- Don't say "I believe" or "I think" when the correct verb is "I know."
- Don't look at your attorney when answering questions.

## General Rules for Witnesses

3. Be certain that you understand the question you're asked, and confine your answer to that question.

- If you didn't catch it or aren't quite sure, ask the attorney to repeat the question.
- If you just need a moment to think, ask the attorney to repeat the question.
- If you don't understand the question, ask the attorney to repeat the question or say, "I'm sorry, I don't understand the question."

## General Rules for Witnesses

4. Stick to the facts and to the truth.

- If you don't know, say that. "I don't know."
- If you don't remember, say that. "I don't remember."
- Avoid the temptation to embellish, even slightly.

## General Rules for Witnesses

5. Always debrief afterward to see how you can improve.

- Get feedback from your attorney and from staff, at the very least.
- This can be hard to hear, but it's necessary.
- Giving testimony is a professional skill that you develop through practice, so feedback is critical to getting better.