

## BASIC TRIAL PRACTICE/EVIDENCE

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### I. Evidence – Basic Principles

#### A. Basic rule – admissible until objection is sustained

##### 1. Family Court variations

- a. “I’ll consider it for what it’s worth”
- b. “I know it’s hearsay, but I’m interested in hearing it”
- c. “Just because I sustained an objection does not mean I sustained it on the grounds stated by counsel”

#### B. Special Evidentiary Rules

##### 1. Family Court Act – Article 3 - Juvenile Delinquency

###### a. 343.1 – testimony by children

- 1) must possess sufficient intelligence or capacity to justify reception of evidence
- 2) 9 plus – only under oath  
Under 9 – court must be satisfied child understands nature of an oath  
If not, can give unsworn testimony
- 3) unsworn evidence alone insufficient for finding
- 4) Vulnerable child (expired 9/2015)

###### b. 343.2 – corroboration of accomplice testimony

###### c. 343.3 – identification by previous recognition w/o present id.

###### d. 343.4 – identification by previous recognition w/ present id.

###### e. 343.5 – impeachment of own witness – prior contradictory stmt

- i) If testimony tends to disprove position of party, impeachment only – not evidence in chief
- ii) If testimony not disproving position, refreshment of recollection only

###### f. 344.1 – proof of prior conviction – when allowed

###### g. 344.2 – Statements of Respondent

- Inadmissible if involuntarily made
  - by any person by use or threat of use of force, other improper conduct or undue pressure which impaired physical or mental condition of R to extent of “undermining his ability to make a choice whether or not to make statement
  - by law enforcement

- promise or statement of fact creates substantial risk of false incrimination
- in violation of NYS/US Constitutions
- violation of 305.2
  - notice to parent
  - approved location
  - *Miranda* warnings
- Corroboration required
- h. 344.3 – psychiatric testimony
- i. 344.4 – rape shield law
  - inadmissibility of evidence of V’s sexual conduct unless
    - specific instances w/accused
    - proves V convicted of offense under 230 w/in 3 yr
    - rebuts evidence of failure to engage in conduct during given period
    - rebutts evidence accused cause of pregnancy/disease
    - Court determines relevant/admissible in interests of justice
- 2. Family Court Act – Article 5 – Paternity
  - a. 532 – admissibility of genetic marker testing exceptions – res judicata
    - equitable estoppel
    - presumption of legitimacy
    - if 95% or more, rebuttable presumption
    - if un rebutted, establishes paternity
  - CPLR 4518 – Business records
- 3. Family Court Act – Article 6 – TPR Proceedings
  - a. 624 – competent, material and relevant at fact finding
    - material and relevant at disposition
    - Evidence of parental contact or failure
      - Not at f/f
      - Yes @ disposition but not sufficient by itself, as matter of law, to preclude or require order
- 4. Family Court Act – Article 7 – PINS
  - a. 744 – fact finding – competent, material and relevant
    - \_ finding requires proof beyond a reasonable doubt
  - b. 745 - disposition – material and relevant
    - adjudication at conclusion – preponderance
- 5. Family Court Act – Article 8 – Family Offense
  - a. 834 - fact/finding – competent, material and relevant
    - disposition – material and relevant

6. Family Court Act – Article 10 – Abuse/Neglect
  - a. 1046 – (a)(i) derivative neglect
    - (a)(ii) res ipsa loquitur
    - (a)(iii) proof of addiction
    - (a)(iv) admission of hospital records
    - (a)(v) central registry reports
    - (a)(vi) prior statements of child to third parties
 

Corroboration required
    - (a)(vii) waiver of privileges
      - husband/wife
      - physician/patient
      - CPLR 4504 – dentist, chiropractor, etc.
      - psychiatrist/psychologist client
      - social worker/client
      - rape crisis counselor/client
    - (a)(viii) opinion evidence re: improvement in care
  - (b)(i) preponderance of evidence for neglect/abuse
  - (b)(ii) severe or repeated abuse finding requires clear and convincing evidence
  - (b)(iii) competent, material and relevant at fact-finding
  - (b)(iv) material and relevant – disposition/other stages

C. Documents

1. Have documents marked before referring to them
2. Do not have witness read aloud unless in evidence
3. What are you using for
  - a. refresh recollection
  - b. substantive evidence
4. Foundational requirements for admissibility
  - a. authenticity
  - b. best evidence rule
  - c. basis for admission into evidence
5. Hospital Records
6. Business Records

D. Photographs

1. Foundational requirements
  - a. fair and accurate depiction
  - b. establish relevance to case
2. Proper sizing

- E. Physical Objects
  - 1. Gun, door, lock, shoes, cocaine
  - 2. Chain of custody
  
- F. Expert Witnesses
  - 1. Establish Qualifications/Relevance
  - 2. Preparation
    - a. manner of presentation – teacher, not snob
    - b. review of materials
    - c. review of issues/questions/approach
    - d. guidance for cross-examination of other experts/witnesses
  - 3. How to find/obtain
    - a. AFC Program compensation
      - i. rate
      - ii. forms/procedure
    - b. AFC program Resource Manual
  - 4. Exercise great care in cross-examination
  
- G. Objections
  - 1. Discretionary
    - a. not every objection should be raised
    - b. not a test
    - c. have a case-related reason for objecting
  - 2. weight v. admissibility
  - 3. strategic purpose

## II. Trial Practice

- A. General Principles
  - 1. Have a reason to try a case and know what it is
    - a. benefits for your client
    - b. client refuses to accept any offer – unrealistic?
    - c. Only try cases that are worth trying
  - 2. Develop a theme and stick to it
    - a. insufficient proof
    - b. bias/prejudice/revenge
    - c. alienation/oblivious to value of other parent
  - 3. “A good lawyer knows the law, a great lawyer knows the Judge!”
    - a. Family Court Judges usually make the final/only decision
      - i. no juries
      - ii stuck with who your case is assigned to
      - iii little opportunity for judge shopping
      - iv every judge has their own quirks/viewpoints

- observe Judge in action
- seek advice from other practitioners
- use waiting time to your advantage

B. Take Control

1. Do not be intimidated by anyone – the Judge, your adversary, your client, yourself
2. Make sure objections are ruled upon by the Court
3. Insist on making your record
4. Challenge the Judge if necessary
  - a. Article 78 – Prohibition

C. Know your case

1. Do not rely blindly upon your client's account
  - "Trust, but verify"
2. Investigate your case
  - a. subpoena necessary documents
  - b. talk to witnesses/knowledgeable persons
  - c. check the substantive law re: elements, standards, etc.
3. Review all documentation available
4. Plan your presentation
5. Admit your case's weaknesses and plan how to deal with them

D. Have a Theory

1. Test the theory with non-lawyers/lawyers
2. KISS - Keep it simple
3. Can you prove it?

E. Be Organized. Be Prepared. Read.

1. Visit the scene – physically or virtually
2. Notebook/file folders
3. Pre-copy/mark exhibits
4. Necessary supplies – have available
  - a. marking pens
  - b. maps/diagrams/aerial photos
  - c. chalk/eraser/
  - d. chalkboard/dry erase board
  - e. tape recorder/DVD/TV/Laptop
  - f. highlighters
  - g. post-it notes
  - h. paper clips
  - i. tape

- F. Get the help you need
  - 1. Investigators
  - 2. Evaluations
  - 3. Social Workers
  - 4. Subpoenas
  - 5. Transcripts/Stenographers
  
- G. Burden of Proof
  - 1. always check before starting the trial
  
- H. Direct Examination
  - 1. Prepare – not as easy as it seems
    - a. outline theory, points to be made
    - b. review with witness in advance
      - i. avoid rehearsing Q/A
      - ii. listen to witness
    - c. let the witness tell their story
  
- I. Cross Examination
  - 1. The Ten Commandments<sup>1</sup> – Irving Younger
    - a. Be brief
    - b. Use plain words
    - c. Ask only leading questions
    - d. Be prepared
    - e. Listen
    - f. Do not quarrel
    - g. Avoid repetition
    - h. Disallow witness explanation
    - i. Limit questioning
    - j. Save for summation
  - 2. *McCarthy On Cross Examination*, Terence F. MacCarthy, ABA ©2007
    - a. The System
      - Short
      - Statements
      - Control
  - 3. Know where you are going, get there, then sit down
  - 4. Use to obtain useful information for your case, not solely to discredit

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<sup>1</sup> Excerpted from *The Art of Cross-Examination* by Irving Younger, ABA Litigation Section Monograph Series ©1976

J. Witnesses

1. Refresh recollection
  - a. establish lack of current knowledge
  - b. establish existence of past knowledge
  - c. ascertain sources for recollection
  - d. do not use source of recollection as evidence
  - e. Past recollection recorded
  - f. caveat – disclosure of material used
2. Impeachment
  - a. confront with statement
  - b. limitations on use of other materials
  - c. admissibility of other documents
3. Subpoenas
  - a. Issuance issues
    - i. Duces Tecum to government entity – Court must issue  
- at least 24 hour notice to entity/opponent
    - ii. service on minors
  - b. Alternative – Releases/Authorizations/AFC Order
    - i. no disclosure requirement
    - ii. no court involvement
4. Client
  - a. Pitfalls/Problems
  - b. Dress/presentation
  - c. Preparation

K. Stipulations

L. Right to Appeal

1. Prepare/File Notice of Appeal
2. Explain to client
3. Notify AFC Program if seeking substitute appellate AFC

M. Resources

1. Other attorneys
2. Other proceedings
3. National Institute for Trial Advocacy
4. *Litigation* – ABA
5. James McElheny
6. Irving Younger
7. Terence MacCarthy
8. Bar Association CLE Programs
9. Reading/Movies

- *My Cousin Vinny*
- *A Few Good Men*

**SATISFACTION GUARANTEED!!**

- The Good – R.C.
- The Bad – Derick
- The Ugly – Custody cases
- The long and winding road - Andrea