

ABA Center on Children and the Law Trial Skills

May 3, 2024 COLORADO

ABA Center on Children and the Law

- Mission: promote access to justice for children and families
- Structure:
 - 20-person team of attorneys and core staff
 - Grant projects across the country focused on:
 - Improving legal representation, and
 - Improving legal systems that impact children and families' lives
 - Connect child welfare and other legal topics (e.g. immigration, education access, kin caregiving)
- Approach:
 - Collaboration and coalition building
 - Local, state and national levels



www.americanbar.org/child

Purpose & Objectives

Opportunity to try new skills, practice advocacy, and learn from your colleagues!

- Materials
 - Case Exercise and Notes – includes case scenario, exercises, exhibits and supporting documentation
 - Resource Notebook
- Explanation of exercises
 - Each participant was assigned an exercise.
 - You will be a County Attorney, Counsel for Youth (CFY) and/or Guardian ad Litem (GAL) or Mother's Attorney (there is no Father's Attorney for purposes of this exercise).
 - Case begins with a removal and ends with a TPR trial.
 - You will have the opportunity to prepare your case and witness during a working lunch.
- Two groups of attorneys. Each group will have one trainer and two witnesses.
- These proceedings may not exactly reflect your jurisdiction's practice but are designed to highlight best practices.



Tell

Experts offer guidance on best practices, with some special attention to complex cases, in lecture format



Show

Trainers demonstrate effective direct and cross examinations of an agency caseworker



Do

Participants engage in assigned court advocacy roles, with feedback provided by trainers and peer participants

The Art of Advocacy

What does it mean to be Culturally Competent?

Cultural competence refers to a program's ability to honor and respect the beliefs, language, interpersonal styles, attitudes and behaviors of individuals and families receiving services, as well as the multicultural staff who are providing services.

At the individual level, cultural competence means an examination of one's own attitude and values, and the acquisition of the values, knowledge, skills, and attributes that will allow an individual to work appropriately in cross cultural situations.

Striving to achieve cultural competence is a dynamic, ongoing, developmental process that requires long-term commitment.

Taken from: Roberts, R., et al. (1990). *Developing Culturally Competent Programs for Families of Children with Special Needs* (monograph and workbook); Georgetown University Child Development Center.

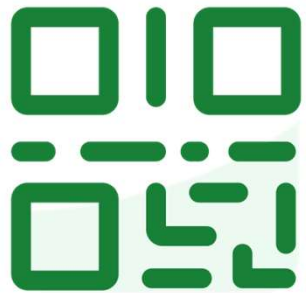
Denboba, D., U.S. Department of Health and Human Services, Health Services and Resources Administration (1993). *MCHB/DSCSHCN Guidance for Competitive Applications, Maternal and Child Health Improvement Projects for Children with Special Health Care Needs*.

Why does it matter in Trial Advocacy?

Children and parents are more likely to receive, engage and successfully complete needed supportive services where the system, services and providers have and utilize knowledge and skills that are culturally competent and compatible with their families and communities.

Taken from: Substance Abuse and Mental Health Services Administration, Center for Mental Services U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Center for Mental Services, retrieved from <http://www.bhpr.hrsa.gov/diversity/cultcomp.htm> on April 2, 2004.

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#CO102**

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How long have you been doing child welfare work?

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Preparation

Organization

- Create a file system – computer or paper
 - Example: common questions of law (i.e., separate file for corroboration evidence with case law and information)
 - Living document to be updated regularly
- “Burn Book” – a book you use so you don’t get burned in court (i.e., regulations frequently cited, objections)
 - Statutes
 - References – i.e., objections, foundation for admission of evidence
 - Resource Notebook shared at Trial Skills
- Establish a file folder for each witness
 - Questions to ask
 - Exhibits
- Consider creating charts and outlines, potentially for use as demonstrative aids

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If you use a burn book or something similar, what would you include?

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Theme or Theory of Your Case: Your Position & Framing

- Make sure the judge clearly understands your theme or theory
- **County Attorneys** have burden of proof
- **CFY/GAL** think about your theory of the case and how you will frame it.

For example:

- Is the agency wrong about the actual facts?
 - Will you get your position across via your own witnesses or cross?
 - How will you focus the discussion on your client?
 - What do you want the fact finder to determine and to order?
- Think about what the other side may do and how to respond to convey your theory

Theme/Theory
Demonstration

Opening by Kevin Bacon & Tom Cruise in
A Few Good Men:



You will see demonstrated the Theory of the
Prosecution's and Defense's Case through
their Opening Statements.

Discovery

- Should get more attention than it usually gets.
- Find out if there are discovery “shortcuts” in your jurisdiction.
 - For example: County Attorneys routinely make relevant portions of case files available to the CFY/GAL in response to a simple discovery request.
- **CFY/GAL** – to make good decisions and advise clients, you must review the agency records.
 - Evolving discovery process throughout the case
 - Make copies of agency files! Mark them up and share when appropriate with clients
 - Organize records into relevant witness folders
 - Consider other necessary records to request and review, such as the child’s school and medical records
 - You may not need formal discovery if you have authority to get your client’s records

Discovery

- Don't wait until the last minute to get records that may take time such as medical records, substance use information, mental health information.
 - If necessary, request subpoenas, or court orders to obtain records.
 - Counsel may oppose your receipt of records.
 - Discovery is critical to making your client's case.
- Consider asking the court to review records in chambers if there is a controversy.
- Preserve objections to any denied discovery.
- Are depositions/examinations before trial and other more elaborate discovery devices "worth it?"
- Think through what is needed if you intend to use discovery items in court to refresh recollection and/or as exhibits.
 - Do you have the right certification to introduce records, or do you need the record caretaker or custodian of records?
 - Getting the records physically to the court?
 - Advance redaction?
 - Privilege?

**AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
Formal Opinion 508 August 5, 2024
The Ethics of Witness Preparation**

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-508.pdf

“Many would condemn a lawyer’s failure to prepare a client or witness. Failure to do so competently and diligently can constitute an ethics violation. But, in some witness-preparation situations, a lawyer clearly steps over the line of what is ethically permissible.”

Ethical Preparatory Conduct

- Remind the witness that they will be under oath and emphasize the importance of telling the truth
- Explain that telling the truth can include a truthful answer of “I do not recall”
- Explain case strategy and procedure, including the nature or purpose of the testimony or process
- Suggest proper attire and appropriate demeanor and decorum
- Provide context for the witness’s testimony
- Inquire into the witness’s probable testimony and recollection
- Identify other expected testimony and explore the witness’s version of the events considering that testimony
- Review documents or physical evident with the witness, including using documents to

Ethical Preparatory Conduct

- Refresh a witness's recollection of the facts
- Identify lines of questioning and potential cross-examination
- Suggest words that might be used to make the witness's meaning clear
- Tell the witness not to answer a question until it has been completely asked
- Emphasize the importance of remaining calm and not arguing with the questioning lawyer
- Tell the witness to testify only about what they know and not to guess or speculate
- Familiarize the witness with the idea of focusing on answering the question, i.e., not volunteering information

Unethical Preparatory Conduct

- Counseling a witness to give false testimony
- Encouraging a witness to present fabricated testimony
- Assisting a witness in offering false testimony
- Advising a client or witness to disobey a court order regarding discovery or trial process
- Offering an unlawful bribe to a witness or securing a witness's absence from a proceeding
- Assisting a witness – whether a client or not – to give false testimony
- Programming a witness's testimony
- Knowingly violating sequestration orders

Unethical Conduct During Witness Testimony and Misconduct in Remote Settings

During:

- Winking at a witness during trial testimony
- Kicking a deponent under the table
- Passing notes or whispering to a witness mid-testimony
- “speaking objection” or “suggestive objection”

Remote:

- Text a witness who is testifying at trial
- Providing a client with answers to questions while off camera
- Signaling a witness with undetectable winks, nods, thumbs up or down, passed notes, or the like

Motions Practice

- Important step in visualizing your case regarding the issues, trial strategies, anticipated outcomes, and preservation of appellate issues.
- Consider whether there are any pre-trial motions that should be filed to clarify and/or limit issues.
- Think of raising and preserving unique issues/arguments through motions and the accompanying memorandums supporting the motion.
- To borrow tag line - Just Do It!

Burning Question



Opening Statements

Opening Statement Demonstration

Example of opening statement by
Denzel Washington in Philadelphia:



An Opening Statement can be done well and
quickly – this one is about two minutes.

Considerations

How common
is it?

Is it going to
be annoying
to the judge?

Will it be
helpful?

Utility of Opening Statements

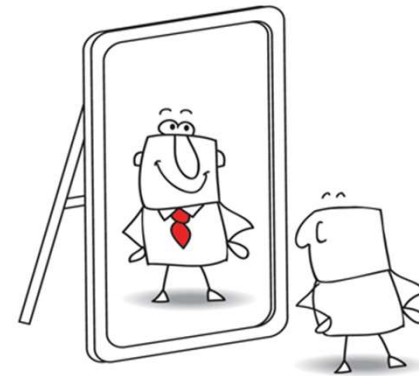
- Informs the court of the number of witnesses.
- Informs the court of logistic problems.
- Helps with evidence arguments if the court knows what to expect.
- Frames what you want ordered from the court.
- If it is a simple case, consider waiving the opening unless it is a new judge or you have never appeared before the judge.
- If other attorneys are going to do an opening, you may need to be prepared to do your own opening!

Three Factors to Help You Decide

- **Complex case** – can help organize a complex case, giving the judge a roadmap of the story that is your theory.
- **Difficult legal questions** – used to alert the judge ahead of time to complex legal questions, to allow for a more advanced discussion of the law and give the court a chance to do some legal research.
- **Stipulations** – consider if there is a procedure to stipulate any specific facts and set those out in an opening – telling the court what has already been established (***Caveat: stipulations do not replace evidentiary hearings***).

Practice!

Never read the opening, use an outline, key words or phrases and practice.



Direct Examination

General Rules for Direct Examination

- Prep, prep, prep – give yourself the needed time to prep yourself and the witness.
- Meet with your witnesses – don't just base your questions on what the agency caseworker or your client has told you.
- Carefully consider the value of a particular witness and the specific facts that only this witness can testify to.
- Review all previous written statements of the witness with them and ask them if this is what they remember saying (for example statements contained in case notes).
- If the witness is not a “professional” like a service provider or in law enforcement – consider carefully whether to use this witness and if there might be some problems on the stand.

General Rules of Direct Examination

- Avoid leading and use open ended questions as much as possible.
- Let your witness tell the story, guide the witness:
 - What happened next?
 - And then what?
 - Help them emphasize the key points slowly and with purpose.
- Stand back from the witness/podium as far as physically possible – stand by or behind the podium:
 - Let the witnesses know ahead of time that you are going to do it.
 - Focus should be on the witness – you are the director helping them shine.
- Finish strong!

#17 - Guidelines
for Witnesses

Testifying about Statements and Conversations

- Child's statements – are they an exception to hearsay in your jurisdiction or are there other exceptions commonly used to get their statements in?
- Statements made by parents may enter as an admission by parents.
- “Set the scene” or “play back the tape:”
 - Date
 - Where
 - Who was present
 - What was said

#11 – Hearsay

Refresh Recollection

Be familiar with your court procedures on refreshing recollection:

- Make sure you know what the court requires – for example: marking the refreshing item for ID or also putting it into evidence.

Discuss questions to refresh recollection with the agency caseworker:

- Ask them what items will help them refresh their recollection.
- Assure them that if they forget that they will be allowed to look at notes, if judge allows.

#6 – Questions to Refresh Recollection

#16 – Questions for Admission of Recorded Recollection

Discuss Expectations

- Go over key questions you are going to ask – “not everything you know is something I need to ask you about.”
 - Assure them you will ask questions if they don’t cover what is necessary.
- Review any exhibits and demonstrative evidence you are introducing:
 - Explain the cues you will use to introduce the evidence.
 - Review foundational questions.
- Remind them of the purpose of the specific hearing and position of the client.

#18 – Permanency Hearing Checklist

Direct Examination – Child Witness

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I have put a child witness on the stand:

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Child Witness

- Be careful not to over prepare child witnesses.
- Be familiar with your local rules about allowable modifications (moving chair, in camera, etc.).
- Consider saving child witness for last:
 - You might not need them to testify, avoid it if not necessary.
 - Consider whether the judge needs to hear from the child.
- Consider whether the judge is skilled at questioning children.

#9 – Interviewing
Children and Eliciting
Child Testimony

In Court

In regard to a child or youth, the court:

- May hear a child or youth separately when it deems necessary
- Shall consult with the child or youth in a developmentally appropriate manner regarding the child's or youth's permanency goal
- May hear from the child or youth in camera to determine the child's best interest and how to allocate parental responsibilities.

In-Camera Interviews

- A record of the interview must be made available to the parent upon request
- Presence of parent's counsel:
 - Determination best left to trial court's discretion on a case-by-case basis.
Considerations include:
 - The age and maturity of the child;
 - The nature of the information to be obtained
 - The relationship between the parents
 - The child's relationship with the parents;
 - Any potential harm to the child
 - Impact on the court's ability to obtain information from the child

Clear Language

Use easy words

Avoid legal words and phrases

Be aware of the different meanings of words (one meaning in real life and another in law)

Just because the child uses the word doesn't mean they understand it

Use specific names and places instead of pronouns

Consider the cultural impact of the language and use language the child understands and uses

ASKING QUESTIONS

Keep

Keep the questions simple

Avoid

Avoid asking “do you remember – X” questions and asking about abstract concepts

Let

Let the child know when you are changing topics or moving from present to past or vice versa

Help

Help the child organize their story

Use

Use as few negative words as possible, (i.e., doesn't, isn't, didn't, wouldn't, etc.)

Specific suggestions

Break long sentences

Choose easy words

Use words that the child is familiar with

Avoid legal jargon

Make sure you and the child are using the same meaning for the word

Avoid asking the child about abstract concepts

Avoid the question of belief, “do you believe that to be true”

Avoid using the word “story”

Repeat names and places often

Watch your pronouns

Direct Examination – Expert Witnesses

Expert Voir Dire Demonstration

Example from my Cousin Vinny – not your typical expert.



Examples of Expert Witnesses

Medical

Mental Health

Education

Toxicology

Serology/Chemistry

Weapons

Crime Lab

Experts

- Make sure you are developing a library of expert witnesses for your ongoing use:
 - Relationships that allows you to use them as a consultant, not just in the courtroom
- Fact expert vs. hired expert:
 - Fact Expert – involved in the case and does not have to be paid.
 - Hired Expert – make conclusions and usually needs to be paid – sometimes sees/interviews/examines people directly and reviews records, sometimes reads records only.
- Do you want an actual report from the expert you have hired?
 - Know their opinion first.
 - Remind them the other side gets to see notes and reports.
 - If using a written report tell them to act as a teacher and walk us through the report, useful with a checklist.

Preparation

- Arrange a meeting to prepare the expert witness:
 - Go to their office.
 - Seeing their office may help you get to know them and their work better.
- Write out expert witness questions (both qualifying and substantive questions) and review with the witness.
- Prepare them for the questions you will be asking:
 - Let the expert explain their theories.
 - Tell them you need them to teach the judge their area of expertise.

Qualifications

- Remind expert witnesses that they will be asked about their qualifications (sometimes known as voir dire).
- Go over qualifications with them – make sure you understand them yourself.
- It is better not to stipulate to expertise; however, if you do, make a record for purposes of appeal.
- If using a curriculum vitae, mark it ahead of time and ask to admit into evidence to save time.
- You don't necessarily need to get the expert witness "certified" in one area of expertise depending on the jurisdiction and expectations of the individual judge.
 - If you decide to qualify them as an expert, make it as general as you can so you can ask more questions.

#8 – Considerations for Expert Witness Direct & Cross

Props



- Props are helpful.
- Props get expert witnesses on their feet.
- Ask the expert witness for props, and keep them in case they might be helpful in the future for other cases.

Opinion Questions

- Questions must be properly framed:
 - Judge may prefer a specific way of asking an opinion question even if not required by court rule – in your jurisdiction do you still ask a formal opinion question?
 - Are hypothetical questions allowed? “Doctor, assume that the 2-month-old child was diagnosed as having spiral fractures of both legs in opposing directions that occurred at the same time, what would your opinion of the likelihood of these injuries being accidentally caused?”
- Review questions with witness before, write out important opinion questions.
- Rule on Expert Reliance on Hearsay (see handout #8 again).
- Testify on facts that the opinion is based upon.
- Know the ending – SAVE THE BEST FOR LAST!

Remember

- If you are using a file for each witness on direct:
 - Have it open with your main points and exhibits.
 - Check off as you go to make sure you covered everything.
 - Use same file for notes during cross to do redirect.
- Determine order of witnesses:
 - Usually, witnesses are best put on in chronological order for a direct.
 - However, County Attorneys may decide to have a key agency caseworker testify first to lay out a broad view of the case and then let others fill in the details.



Burning Question



Cross Examination

Do I Need to Cross the Witness?

- Remember your theory/theme:
 - Did this witness hurt your case with their direct testimony?
 - Were there actually some parts of their testimony that helped?
 - **Are there at least 3 points you can make with a cross? If you don't think you can make those 3 points, then don't do it. Cross only on your 3 points.**

- It is so hard to resist! (It is the fun part sometimes!)

- Witnesses you may not need to cross:
 - If they were a sympathetic witness on direct, it may make it worse and not really add much - examples: clearly mentally ill parent, sobbing child.
 - If you determine that there is really nothing they can add to your case - they are not going to say, "You are right, it was all a lie."
 - Assess the level of risk – how much do you need to cross based on how your case is going?

General Cross Tips

- Don't just get up there and go over what they already said:
 - Risk ending up supporting and reinforcing the direct which may not be your position.
 - Biggest mistake less experienced attorneys make.
- Never ask why – always **know** the answer!
- Always lead – you tell the story!
- Don't let them ramble, **control the witness**.
- Don't go over the whole story - consider a file folder for expected witnesses you will likely have to cross:
 - Go over previous statements.
 - Review transcripts in advance:
 - Use your notes if you can't get a transcript.
 - Pretend to read them even if not written down.

What is Your Cross “Plan” for this Witness?

- Show that they don't have all the facts.
- Demonstrate that they have made conflicting statements.
- Stress any possible bias, hostility, motivation to fabricate, or any prior bad acts.
- Show they are not worthy of belief, discredit them – what they are saying does not make sense, seems highly unlikely.
- Cooperative cross – little admissions about things that help you & ignore what doesn't help your case.
- Destructive cross – show this person is wrong and giving inaccurate information.
- Do not fall into the TV trap of trying to get them to do an experiment – “if the glove didn't fit...”
- Your position and tone:
 - Camera should be on you (not the director anymore).
 - Physically as close as you can be to the witness, so judge pays attention to you, but maintain proper decorum.

Cross of Expert for the Other Side

- One of the toughest skills.
- Discovery is critical – make sure you have done your homework – who have they testified for before. At minimum – google them!
- Look at past transcripts to discredit them, find previous testimony that contradicts today's position.
- You may not need to cross in areas you have already used your expert to teach the judge.
- Impeachment of expert is tough – assess your level of risk:
 - Don't try to impeach unless you are confident of what they are going to say – the risk is they may look better after your cross.

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Assess the level of risk of cross an expert (1-3). 1= Less 3= Most

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Use a hypothetical - remember you could get a concession -- If you knew this fact, would it change your mind?

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Knowledge of facts – where did they get that information; how did they gather their info?

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Did they refuse to talk to you prior to trial?

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**Treatise/scientific evidence or book
(requires time)**

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Confront their methodology, validity of research

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Bias – paid to testify, but not usually that big of an issue for judge

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Not qualified, no experience on this topic

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Cross of the Other Side's "Major Witness"

- Usually, the caseworker or the parent.
- Be careful of not hurting your case – look for “small but helpful admissions” vs a “rip ‘em up” style
 - only if you think you can show bad casework or parent is clearly fabricating
- Remember the golden rule: don't just review the entire testimony they already gave on direct.
- Avoid:
 - “You want this court to believe...?”
 - “You're under oath!”
 - Sarcasm.

Cross of the Other Side's "Major Witness"

- What admissions can you get that let you use the witness to your advantage:
 - Get concessions on certain points using short "small" questions.
 - Examples: time and place, people's perceived positives
 - Don't expect witness to break down.
- Use the file you prepared for cross on previous statements and previous testimony, prior convictions (make sure to check with prosecutors, police, other attorneys for any such info).
- The other side's major witness can often be crossed on bias, interest, hostility.

Exhibits

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Share some unusual exhibits you have used or have seen used in your practice.

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Exhibits

- Typically, an area the CFY/GAL should consider, for example photos of how home currently looks good or bad, photos of physical injury, video or photos of parent interaction with children to show bonding or lack thereof, certificates from completion of services, expert materials.
- If you are in a smart courtroom, practice using the technology and take full advantage of it!
- Keep it interesting!
- Most common in our cases - Business Records:
 - If required to be certified, make sure you know how to do that.
 - Know your jurisdictions contemporaneous rule and have backup with cites.
 - If hearsay within the record, advance redaction discussion with the other counsel can speed things up and court may be appreciative.
 - Remember that judges do not like to read large amounts of business records, use of a witness to summarize may be the better idea.

Exhibits

- Other Typical exhibits include:
 - Photographs
 - Past recollection recorded
 - Charts
 - Documents
 - Tapes
 - Objects – be familiar with chain of custody issues
 - Belt
 - Guns
 - Drugs
- Not a difficult thing to do, just describe what is being offered.
- Create an Exhibit Chart with 2 check boxes: marked for ID and moved into evidence.

Resources

#5 – Questions for Admission of a Photograph

#10 – Questions for Admission of Business Records

#13 – Foundations of Exhibits

#14 – Questions for Admission of Exhibits

#12 – Foundation Questions for Admission of Electronic and Social Media Evidence

Objections

Objections - Generally

- When you make an objection, at first make it general.
- Always on the record to preserve for appeal.
- Don't "whine" or "accuse" the objection – just state it.
- **Don't always object, make it mean something** – Does it hurt you? Who cares?
- The continuing objection – in some jurisdictions a continuing objection will not protect the record – try not to be annoying but make your record, you must repeat the objection if required to preserve.
- Consider making an offer of proof/proffer if denied:
 - If this is important testimony, it will sometimes pause the judge, makes them wonder "why it is so important" and "its usually better to hear it and then later decide to give it little or no weight then to refuse to hear it."
 - Preserves your issue for the appeal.

#4 – List of Common Objections

Objections – Arguing

- Don't argue with opposing counsel – it's the judge who needs to be convinced.
 - Don't position yourself to look at the other lawyer, look at the judge.
- If you are arguing against an objection, wait to see if it is necessary to respond – court may rule without a response, if overruled then give your argument.
- Ask to be heard further, if necessary, to establish record.
- Don't withdraw a question after opponent objects, wait for the judge to decide.

#11 – Hearsay

Closing Argument

Closing Arguments

- A time you can get emotional – closing argument is an opportunity to remind the court that these are real children, real families. **Tell your client's story.**
- In many jurisdictions, with no juries, tendency is to waive. If your court likes them waived, then there are **3 things to consider** in favor of giving a closing:
 - Has there been a lot of time breaks between trial days – does the judge need a refresher?
 - Complicated facts and lots of witnesses – provides a way to give an overview of your case and theme.
 - Are there significant legal issues – maybe you brought this out in your opening, and/or legal issues that came up during trial and you have case law you want to highlight on the issues.
- **Use it to focus on facts, laws and type of order you are seeking:**
 - Can demonstrate how the outline and timeline are used from opening, into direct, during cross, and at closing.

Closing Arguments – Oral vs. Written

Oral

- Short and to the point with things written out ahead of time as you are conducting the trial - not helpful to go witness by witness.
- More helpful to focus on grounds and how facts support or don't support.

Written

- Sounds good when you are tired after a day of testimony, gives you time to really reflect calmly.
- Consider your skills, time and the court's likelihood of reading it.

Post-Trial

Post Trial

- Remember you have a client, and that person needs to understand what happened – give them your attention and explanation without trashing the legal system or the judge or opposing counsel which does not help and could be unethical.
- Schedule follow up meeting to discuss next steps and appeal options.
- Write a note to the key people in your case and reference your appreciation for them being present in court and helping in the case:
 - If appropriate tell them what the court ruled (i.e., expert).
 - Helps them remember you and builds rapport.
 - Feedback that they did well and helped a child, a family.
- Reflect and take notes on what can you do to make you more organized for next time? What can you use again?

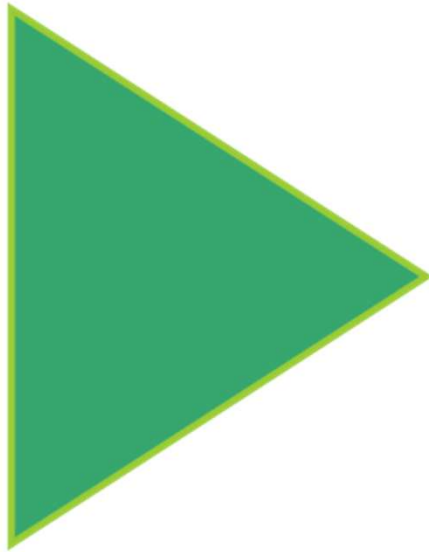
Final Thoughts





Break

15 MINUTES



Demo

Caseworker Direct & Cross

Afternoon Assignments

Working Lunch

Working Lunch

REVIEW MATERIALS

- Read the case scenario.
- Read your exercise assignment and review all related materials, attachments, and props.
- Think about how your exercise will advance your theory of the case.

PREP YOUR WITNESS

- Think about what preparation you need to do to prepare your witness.
- You will only have a few minutes with your minutes because this person is the witness for several people.
- Reminder: you might have to wait your turn.