



How the Medical Provider Prepares for Testifying in a Case of Child Sexual Abuse

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Disclosure

- I have no financial interests related to this presentation.
- I am not a lawyer.
- I will be discussing legal issues as they apply in NYS.



Objectives

- Describe how to prepare for a court appearance.
- Describe how to testify in court.



How many times have you testified in court?

- I have never testified.
- I have testified once.
- I testify less than 6 times a year.
- I testify about once a month.
- I testify more than once a month.

Legal Issues

- Confidential and privileged communications
- Subpoenas
- The judicial system
- Testifying
- Documentation issues



Confidential and Privileged Communication

- Communication between a physician and patient is always considered confidential.
- Child abuse suspicion is an exception.
- Privileged communication means that disclosure cannot be compelled in court.
- Family Court Act states that no privilege applies to child abuse and neglect.

Confidential and Privileged Communication

- Despite the physician-patient privilege, assume that medical records involving cases of child abuse will become available in a criminal or civil legal matter.
- Do not assume you can and should turn over records to police, attorneys, or others without determining if authorization exists.
- When contacted by an attorney, determine whether you are authorized to talk to the attorney before releasing information.
- Any information turned over to one party will be turned over to all parties.

Subpoenas

- Witnesses are called to testify in court through the issuance of a subpoena, sometimes delivered by a process server.
- Subpoenas may be issued by a grand jury or a court. Attorneys will issue subpoenas on behalf of a court. Must be signed.
- Subpoenas may require an individual to appear in court or may require an individual to bring records to court.
- Subpoenas may be delivered to your place of work. You are required to appear even if you do not personally receive it.

How to get out of going...

- The target of a subpoena can appear in court requesting that the subpoena be quashed claiming:
 - Physician-patient privilege;
 - Statutory protection for a record, as in drug treatment programs;
 - The subpoena is overbroad;
 - Witness is unlikely to be able to provide material, relevant information.
- You can also contact the attorney issuing the subpoena if you do not have any information that is new or relevant to the case.

If you can't get out of it...

- Ask to be "on-call."
- Give a contact phone number.
- Assist the attorney as much as possible.
- Ask to be sure they have all written materials, including any statements you may have provided.
- If testifying as an expert, notify them of your fee.
- Do not ignore the subpoena.

The Judicial System

- Criminal Court
 - Addresses interests of the state
 - Prosecutor pursues charges against the suspect
 - Prosecuting attorney and defendant's counsel are present
 - Victim is a witness, under the age of 9 years cannot testify without qualification to testify.
 - Statute of limitations limits timeframe for prosecution
- Civil Court
 - In New York, Family Court is charged with adjudicating violations of Social Services Law that prohibit child abuse through child abuse and neglect proceedings brought by counsel for social services departments.

Criminal Court

- The burden of proof is beyond reasonable doubt
- Witnesses can be "fact" or "expert"
- Out of court statements are considered "hearsay"
- Defendant's rights: fair trial, presumed innocent, right to confront the accuser
- Double jeopardy

Criminal Court: Grand Jury

- Case is presented to Grand Jury (16-23 jurors) to determine need for trial:
- It can:
 - File an indictment (for misdemeanor or felony charges);
 - Vote a "No True Bill" (dismiss the case or not indicted);
 - Return the case to Criminal Court (file misdemeanor charges only and refer the case back to the lower court);
 - Remove the action to the Family Court (file charges against a juvenile aged 13-15 to be prosecuted in the Family Court rather than treat the juvenile as an adult to be prosecuted in the Superior Court).



Civil Court

- Inherent in both statute and case precedent is the belief that the best interest of the child is most often served when that child remains with his or her own family.
- Burden of proof is much lower than criminal court.
- Hearsay evidence may be more acceptable.
- Child witness less likely to testify.
- Other situations: custody and visitation disputes that involve child abuse allegations; lawsuits against alleged abusers or against third parties for damages resulting from the abuse or the failure of the third party to meet their obligation to protect the child from abuse, including failure to meet legal obligations to report.

Testifying

- Fact Witness
 - Required to testify regarding observations, findings and diagnosis regarding a child you treated.
- Expert Witness
 - Testify regarding matters that would be outside the normal scope of knowledge and experience of the judge or jury.
 - Opinion, hypothetical or dissertation testimony.
- Hearsay evidence
 - Refers to courtroom testimony regarding statements made by another person outside of court.



Hearsay Evidence Exceptions

- Excited utterances (startling event)
- Fresh complaint of rape
- State of mind exception
- Medical diagnosis of treatment (Must document that the child understands the nature, purpose and need for accuracy of the exam. Document how the information disclosed is pertinent to the diagnosis and treatment.)
- Child hearsay exception
- *Ohio v. Roberts* and *Crawford v. Washington*

Medical Record Documentation

- Who is in the room
- What questions were asked prior to disclosure
- Use quotes only if really a quote
- Document findings objectively, presence and absence
- Document “why” tests/evidence not done
- Avoid terms that may be interpreted differently
- If you make a mistake in documentation...then what?

First Steps

- Create a file of information on the case.
- Ask for a subpoena.
 - Is it Family or Criminal Court?
- Review the case file/medical record.
 - Memorize a few details.
 - Check for consistencies in the record.
- Contact the attorney and/or CPS to consult.
- Ask to be “on-call.”
- Review pertinent literature.
- Update your CV and review it for your qualifications.



Testifying in Court

- Appearance/attire
- Procedure for testimony (direct and cross examination)
- Communicate effectively (the truth, of course)
- Recognize that the system is adversarial
- Stop and think before answering
- Ask to repeat questions if unclear
- Answer yes or no if asked direct questions
- Ask to see record if you do not remember
- Do not give opinion beyond area of expertise
- Think about your “demeanor”



CASE

You examined a 15-year-old teenager in the emergency department and you receive a subpoena one year later for the criminal trial.

Are you a fact or expert witness?

- Are you a fact or expert witness if you had not examined the adolescent and were called by the defense?
 - Fact witness
 - Expert witness

Can you refuse the subpoena...?

- If you did not examine the adolescent?
 - Yes
 - No
- If you examined the teenager but your colleague with more experience also examined the teenager and was not subpoenaed?
 - Yes
 - No

Can you refuse the subpoena...?

- If you are a nurse and are subpoenaed along with the physician, do you both have to go?
 - Yes
 - No

Can they subpoena...?

- Can your personal notes be subpoenaed?
 - Yes
 - No
- What about releasing photographs?
- Can you bring a copy of the records with you?

The attorney for the prosecution calls you to set up an appointment but you are too busy to meet...

- What should you do?
- What are the risks of not meeting with the prosecuting attorney?
- What if the defense attorney calls you and wants to talk to you?



CASE

The adolescent had no physical findings and no evidence was identified in the evidence collection kit.

- Should you still testify?
- Questions the prosecution should ask...

What are your resources?

- Come prepared with a list of references on the tip of your tongue.
 - Adams, Kellogg, DeJong, Makoroff
- OK to use your experience to give an opinion.
- Opinions should be based on a reasonable degree of medical certainty.

What is a reasonable degree of medical certainty?

- Not 100%
- Based on the literature
- Based on common medical knowledge
- Based on your experience

Cross Examination

- You are repeatedly asked the same question about the examination being normal.
- No “yes, buts” are allowed in cross.
- Prosecution should be prepared for re-cross when this happens.

Inappropriate Questions

- Have you ever been abused?
- How much money are you being paid?
- Questions beyond your scope of practice.

Can you object to inappropriate questions?

- Yes
- No

The Afterthoughts

- Second guessing your answers
- Remember, you were not the only witness
- Ask the attorney to call you with the verdict
- Track your trials



What about the media?

- Whatever you say can and will be used against you.
- Less is more.
- Do not discuss the case with anyone.



Summary

- Preparation should start the minute you see the patient.
- Testimony is more than about the facts.
 - Expert opinions—require research.
 - Maintaining a professional demeanor is critical.
 - Assisting with appropriate questions prior to the trial is also critical.
 - Advocate for the truth—not necessarily on one side or the other.

<http://childabusemd.com/law/legal-overview.shtml>
