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Challenges Attorneys Face When Family Courts Do Not Follow Rules of Evidence

Courts are known for their many rules and regulations. While there are times a family court judge may properly make exceptions to the rules, too many exceptions, or exceptions contrary to accepted science, may reduce transparency and accountability, may undermine predictability, and may not be in the interest of justice. What can attorneys do?

By **Toby Kleinman and Daniel Pollack** | October 21, 2019



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Rules of evidence exist to provide for the fair, objective, reliable and prompt resolution of cases. Many family courts across the country are permitted to modify the Rules of Evidence and Court Rules in the “interest of justice.” For instance, New Jersey Court Rule 1:1-2. Construction and Relaxation; References to Marriage, Spouse and Related Terms, provides:

(a) The rules in Part I through Part VIII, inclusive, shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice. In the absence of rule, the court may proceed in any manner compatible with these purposes and, in civil cases, consistent with the case management/trial management guidelines set forth in Appendix XX of these rules.

Therefore, judges sitting for a motion hearing, plenary hearing, or trial, may disregard a court rule or evidence—which is important to be able to do in certain circumstances. After all, the rules cannot be comprehensive in every aspect and will not cover every situation that may arise. In such cases, the rules should be construed to promote the ends of justice. It also means that when judges have a bias in favor of one client or another they can enter a ruling modifying the court rule or ignoring it and not be aware of or disclose a bias. They can modify the requirements and never even place findings of fact and conclusions of law on the record, nor state their modifications and reasons.

Rules of Court and Rules of Evidence will normally keep a judge within certain guidelines because an appellate court will reverse a judge if they make findings that are without foundation. In child custody cases, for example, judges can elect to ignore scientific methodology in favor of someone’s expert opinion because it appears to them to have sound reasoning or for some other reason they consider to be in the interest of justice. It means that evidence an attorney seeks to present may be kept from introduction as evidence. Ultimately, attorneys can be stymied; and for litigants, it can become more financially burdensome to litigate issues even where litigation is necessary for resolution.

If an expert is hired for financial issues or child custody issues, there is no guarantee a court will hear the expert testify. What can attorneys do? How do attorneys give

sound advice? A litigant has a right to hear a judge's reasoning. If a court does not put its reasoning on the record it is up to the attorney to ask the court to do so.

Therefore, fundamental rule: Make a record for appellate purposes.

If a court relies upon a written report to make a ruling without testimony, ask the court to reconsider, with an opportunity to cross-examine that witness. Recall for the court, if necessary, the adage that "Cross examination is the searchlight to the truth." If a court permits an expert to testify without the requisite credentials, ask to cross-examine the expert on their credentials before they are permitted to testify, and object to the expert testifying when their requisite credentials become apparent that they are inadequate. This requires that attorneys be knowledgeable regarding the science that's being posited.

Historically, because some attorneys may not have been knowledgeable regarding the science they were proffering, some courts began to permit 'junk science' as if it were actual science on issues, such as Parent Alienation Syndrome. The backdrop for admission of these sequelae are not based on science. It is up to the attorney to know, cross-examine, and object to its entry into the record.

Attorneys dealing with any substantive issue which can be tried must familiarize themselves with the accepted standards within the practice—be it financial or custodial. Only then can they properly object. Proper objections are a critical first step. But what does one do if all objections are made and improper evidence is permitted? This is also objectionable, if the evidence itself is improper. Thereafter, one must consider the implications of any particular ruling. If the issues can potentially turn a judge against your client indefinitely, consider doing an interlocutory or emergent appeal. Generally, the standards for reversal at that stage of litigation are difficult. The general requirements to file for emergent relief are (1) being able to show the irreparable harm of the ruling, (2) that reversal will not do more harm than good, (3) that the person raising the issue on appeal has a likelihood of success were the issue to be appealed, and (4) that the issue raised on appeal is settled law.

If the ruling has the potential to negatively implicate the client's positive outcome or cause more litigation, an appeal may be necessary. How do attorneys prepare for such a circumstance? As with every aspect of legal representation, there must be a discussion of cost. Assuming it can be afforded, hiring an expert in advance of the

‘unscientific testimony’ should be considered. A critique of that expert’s work should be written a report sent to the court in advance of a hearing.

In the area of child abuse in some circumstances in family court, mere generic training is insufficient to warrant being permitted to testify. This is recognized by various child protection organizations. Accordingly, some states require training in the specialized area as well as in general areas. Unless attorneys are familiar with these distinctions their client(s) and their children may be harmed by a court’s rulings. If you become aware that a court expert does not have the requisite training or experience object to the entry of that person, don’t wait for an expert report. And, consider hiring an expert beforehand to critique and object. This can save a lot of litigation costs later on.

Courts are known for their many rules and regulations. These are established in order to promote justice. While there are times a family court judge may properly make exceptions to the rules, too many exceptions, or exceptions contrary to accepted science, may reduce transparency and accountability, may undermine predictability, and may not be in the interest of justice.

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