TEXAS LAWYER
EXPERT OPINION

Effective Strategies of Doing Direct and Cross-Examinations of Mental Health Professionals in Child Abuse Cases

Elisa Reiter and Daniel Pollack | **September 13, 2021**

What You Need to Know

- During FFY 2019, CPS agencies received an estimated 4.4 million referrals involving the alleged maltreatment of approximately 7.9 million children.
- How many of these cases resulted in civil lawsuits is unknown; also unknown is the much smaller number that actually go to trial.

- When they do go to trial, mental health professionals will certainly be among the witnesses; are there particularly effective strategies that attorneys should use on direct and cross-examination?

The federal government, in its report. *Child Maltreatment 2019: Summary of Key Findings,* writes:

During FFY 2019, CPS agencies received an estimated 4.4 million referrals involving the alleged maltreatment of approximately 7.9 million children. The national referral rate is 59.5 referrals per 1,000 children in the population. Of these referrals, approximately 2.4 million reports—concerning approximately 3.5 million children—were screened in as "appropriate" for CPS response and received either an investigation or alternative response. The national rate for children receiving either an investigation or alternative response was 47.2 children per 1,000 in the population.

How many of these cases resulted in civil lawsuits is unknown. Also unknown is the much smaller number that actually go to trial. When they do go to trial, mental health professionals will certainly be among the witnesses. Are there particularly effective strategies that attorneys should use on direct and cross-examination?

The very use of the term "child abuse" casts certain inferences. Those inferences arguably create bias in the mind of a mental health professional handling the case. For example, if parents accuse each other of alienating the child's affections, will a child's outcry of an intention to engage in self-mutilating behavior or suicidal ideation be taken seriously, or will the mental health professional simply dismiss the outcry as being a seed planted by someone intent on engaging in parental alienation? If

the latter, an attorney may have a first step in cross examining the mental health professional. Here are some other steps:

1. Review the pleadings and supporting affidavit. Has the mental health professional sworn out an affidavit alleging child abuse? Likely, the affidavit includes hearsay. Is the affidavit subject to objection? Is there hearsay within hearsay within a supporting affidavit or other records? Is there any cushion because the mental health professional is an outcry witness?

2. Daniel W. Shuman and John Zervopoulos write in their article, "Empathy or objectivity: The forensic examiner's dilemma?":

Examiners are ethically bound to manage personal biases that may infect their expert opinions. Empathy-related issues that lead to bias in forensic assessment of adjudicative competence arise in evaluation interactions with defendants (therapeutic empathy) and from examiners' personal views of issues that these assessments address (empathy-bias).

As an attorney, what do you attack? Hindsight and confirmatory bias. Did the mental health professional simply see what they wanted to see or manipulate the facts in such a way to comport with their assessment of child abuse? Does the mental health professional have a proclivity for institutionalized bias because they work for the state's child protection system? Can you detect blind spots the mental health professional may have regarding their assessment? Do our unconscious biases toward groups and individuals unwittingly stigmatize our judgment? Such blind spot biases may mislead those involved in child abuse cases into errors of judgment. See Dr. John Zervopoulos' Bias Codex.

3. Regarding records, consider a Subpoena Duces Tecum, Deposition by Written Questions and/or a videotaped/transcribed Deposition. Be sure to review any testing records and billing records, as applicable. Consider the following:

- Do the records reflect a diagnosis?
- What was the treatment plan?
- Was the child interviewed in either parent's presence?
- Were there prior reports of abuse or domestic violence?
- Were there any protective orders granted?
- If the child was injured, was the child examined by anyone regarding any physical signs of abuse?
- Is this litigation retaliation by one parent against the other?
- Were there reports of the alleged abuse made to Child Protective Services (CPS)?
- Was the child taken to a hospital for treatment?
- Are there criminal records?
- Was there a police report?
- If the child was not taken to the hospital, was the abuse reported to any other authority, or was there treatment sought anywhere?
- Can the physical injuries be explained in any other way?
- Was there an arrest?
- Was there a protective order application filed or issued?
- Did the District Attorney refuse to seek an indictment?
- Regard billing, did the mental health professional approach the child as a patient, or as if conducting a forensic investigation?
    - If the former, does the child know the difference between right and wrong?
    - Is there any evidence of the child having a history of lying?
    - Do either of the parents and/or the alleged perpetrator have a history of lying?
    - Is there a prior criminal history for anyone involved?
    - Did the mental health professional reach out to in order to verify the allegations of child abuse?
    - What records were interviewed, and when? CPS records, medical records, criminal records and school records should be reviewed.
    - Did the mental health professional have the applicable license to allow him or her to have the parties and their child engage in psychological testing?
    - Were there computerized test results? If so, where were the tests scored, and are any diagnosis noted in the testing results trustworthy?
    - Did the mental health professional review prior child custody evaluations of the parties? If so, when? Did that review color the professional's perspective on the case?

4. Which credentials does the mental health professional have? Make sure the mental health professional is familiar with the following:

- Applicable state laws regarding child abuse and how evidence of abuse may impact child custody.
- Evaluations of children who have suffered trauma.
- If there was intent to self-harm, what did the mental health professional do to assess the child's status, versus simply ignoring the outcry and attributing it to an act indicative of parental alienation?
- If there is an attorney ad litem involved, has the attorney sought training in trauma based education?

5. Regarding Daubert, Joiner and Frye, is the witness credible? Does the witness base his or her testimony on reliable, verifiable data? Should the judge act as gatekeeper to allow the testimony, or slam the door and exclude the mental health professional's testimony? If a child is to act as a witness in a child abuse case, what special precautions should be taken?

There are a variety of way of enhancing and attacking the testimony of a mental health professional, including: impeachment with prior inconsistent statements, bias, interest in the outcome, signs of coercion, coached testimony, prior misconduct for which there was no prosecution, defects in capacity, lack of interview of records or collateral witnesses, and contradictions in testimony. When it comes to child abuse cases, always err on the side of best interest and protecting the child.

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