GAL VOLUNTEER TESTIMONY WORKSHOP
Presented by
Hillary Kambour, Esq

(1) The court fact-finding process in general

a. You could imagine a system where judges were more like independent investigators and read every single piece of paper and went out and did their own observations, etc. That would be incredibly cumbersome. The court system has to balance thoroughness with efficiency, so we use an adversarial process. The parties put on their best cases and the court decides between the two.

b. This system works pretty well if each party (and position) zealously advocates for their position. In this way, the court has the story from all perspectives. It gets messy when one advocate is less forceful and there is an imbalance. When this happens (as when say, the Mother's counsel is less than active) other parties may feel a need to support that unrepresented position. ("Well mom isn't that bad.") This is when the system stumbles. Lesson is stick to your advocacy. Sometimes this can be difficult. You can be overwhelmed with a sense of "why are you asking me? I'm only a (fill in the blank)." Remember, you don't decide, the court does. But it can't make a sound decision without your zealous advocacy on behalf of the child.

c. The court, in theory, isn't expecting (and doesn't want) every single fact and nuance. It only needs and wants what is most relevant and most persuasive for each side on a given issue. (Your mileage will vary, depending on the sophistication and personality of the judge. Example: some play therapist or doctor from the bench.)

d. Lawyers are the gatekeepers for those strategic decisions.

(2) The role of your attorney.

a. Why does your attorney always want you in court?
Because you know the facts. And although you will tell your lawyer what you know before they come to court, many times issues will arise in the case that you have not discussed before hand. The lawyer will not know how to respond if you are not there.

b. Why, when finally come to court does the lawyer always tell you "shhhh, tell me first?"
Because they are protecting the record. You are not responsible for knowing the legal meaning of the words you choose or the position you take, but the lawyer is. They are

required to ensure that you don't inadvertently take a legal position that is adverse to what you want. When they know what you are going to say, they relax and let you say it.

(3) Role of guardians ad litem in the adversarial system.

a. You are not experts.

i. You are a bit of a hybrid somewhat unique in the law. You give recommendations (as opposed to opinions) but because no one really knows what this means some judges will treat you like experts (and let you testify to hearsay for example) and others will treat you like any other fact witness. There is no law yet on the subject.

b. What are you?:

i. You make recommendations to the court regarding what is in the best interest of the child. This means you gather information and along with your supervisor and your lawyer utilizing a whole set of factors, you decide what is in the child's best interest regarding the pressing questions for the court whether it be placement, services, visitation or reunification or termination of parental rights. This is how our three legged stool works. I can't go to court without your information and you need the guidance and support of your supervisor to get services and information for your child and you need the lawyer to help you get what is in the child's best interest, in court.

ii. Fact witnesses: things you saw, did, heard. This is why it is so important that you hear and see things, such as visitations between parents and children. If you go to a visit, you can observe the interaction (one gal told me she likes to arrive early so that she can observe the way mom and child greet each other because it's so telling). Also, you can testify to anything mom or dad tell you. So speaking to them can be very informative and helpful at trial. Also, you can testify about what you observed when you were speaking to them. (One GAL testified about the Mother's obvious mental capacity problems. She testified: "It is not possible to have a conversation with the Mother. If you ask her when she last saw the child, she responds by saying, "I took the bus here.") Don't give court the conclusions: "mom is mentally retarded" but rather describe the behavior. Also, try to engage them sympathetically by talking to them about their case manager and services. This is serving two functions: 1) creating a relationship with them and 2) finding out early if they are not getting their services so we can ensure that the Department is making reasonable efforts.

ii. The opposing side, if doing their job, will spend a lot of effort pointing out the weaknesses in your testimony.

iii. Do not think of it as "attacking you or your testimony"—that externalizes what they're doing and portrays it as some kind of unfairness. Opposing counsel HAS to point out the weaknesses or they are being negligent in their duty. Legal ethical rules state : "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities." Fl. R. Prof. Conduct 4-1.1(b). That means the lawyer doesn't necessarily think their client is a great guy or that you're a horrible person: but their job requires them to take

that position, and the extent to which that's believable is one marker of quality in a lawyer.

iv. Opposing counsel should never be able to point to any weakness in your testimony that you yourself haven't thought of first.

v. Obviously, not all efforts by opposing counsel are legitimate. Once you've testified a number of times, you'll begin to recognize standard distractions and red herrings that opposing counsels use: you should take note of those and develop strategies for responding in the future. We'll go over those later.

c. Why does my lawyer tell me I can't change/ask for something?

In Dependency, we are governed by the laws contained in Chapter 39. They tell judges when they can limit contact, order services, reunify families, terminate parent rights, etc. In order to achieve ANY outcome in court, we convince the judge that the LAW is on our side. We must fit the evidence into the prescribed legal requirements. It isn't enough to say, "I think its best for the child" in many instances. Instead, we have to have admissible evidence to prove what the law on any given point requires us to prove.

Here's the problem: You first meet little Johnny when he's a mess. He's wetting the bed, acting out in daycare and having terrible nightmares. He won't speak to you when you visit, but hides in the corner. As the year goes on, you watch little Johnny overcome his fears, forget his past and little by little these symptoms go away and now you are greeted by an adorable child who comes running to you and jumps in your lap. This is because all of Johnny's problems stemmed not from who little Johnny is but the conditions from which he was removed. So while you are watching this beautiful child blossom under the nurturing and support of a caring stable caretaker, the mother finally started doing drug treatment in month 8 and has been clean for 4 months, living in a tiny efficiency in a really bad neighborhood and working at KFC. It may be, that the law requires Johnny to go home to Mom because we only keep children from their parents if it isn't safe, not if it's not as nice as the foster home.

(4) Basic evidence rules

a. The purpose of the trial is to collect facts. Imagine that the judge was writing the final judgment on the stand right as the trial was commencing (which some judges do). What can the judge write down as a true fact?
   i. Personal observations of the witnesses.
   ii. Opinions of experts.
   iii. Legal conclusions.
   iv. Recommendations of the GAL

b. The judge cannot write down "relayed information," or things the witness just learned from someone else. (Note: Don't call it hearsay yet.) Why not?
   i. Relayed information is prone to intentional or unintentional corruption (the telephone game).

ii. Relayed information is inherently limited in detail and can't be cross-examined. The witness would respond to every question, "I don't know…my source didn't tell me that part." In the interest of fairness, the person who originally made the statements needs to be there so that we can pick their brain.

c. The definition of hearsay: any statement made, other than the witness testifying on the stand, that you're asking the judge to write down as a true statement. Statement includes paperwork and documentation. Don't get caught up on the rule: it's a rule designed to promote fairness.

d. Also don't worry about what isn't hearsay vs. what is an exception to the hearsay rule. You don't need to know that. There is one that is important because it affects how you do your job and how you document your cases:
   i. Party admissions: anything the opposing party says is admissible against them, because it's not unfair—they can take the stand and fill in the holes themselves.
      1. "The mother/father told me…." is almost always going to be admissible. Make sure your documentation of conversations with parents is very thorough. That can often be the best evidence against them. Example: "The mother told me three times during this case that she could not take care of the child." That's strong evidence.

e. The most important thing to know about hearsay:
   i. LET THE LAWYERS WORRY ABOUT THE HEARSAY.
   ii. A STATEMENT IS ONLY INADMISSIBLE IF OPPOSING COUNSEL OBJECTS.
   iii. OR IF HEARSAY IS THE ONLY THING THE WHOLE DECISION IS BASED ON.

f. Hearsay strategies as a witness
   i. Opposing counsel is very busy during a trial: listening to testimony, writing notes, being badgered by their client, thinking of questions to ask, thinking about lunch, etc. A small part of their brain is listening for certain words to come out of the witnesses mouths, like "She told me…" They will immediately object and you will get shut down.

   ii. DON'T INVITE A HEARSAY OBJECTION. Never telegraph to opposing counsel that you're about to testify to hearsay. I have heard witnesses literally say on the stand, "I don't know if I'm allowed to say this because it's hearsay." Opposing counsel immediately objected and the witness didn't get to say it, whether it was admissible or not!

   iii. Take out all narrative markers, like "He told me…." Or "I read that…" Or "According to prior reports…" Just present the facts and leave it to opposing counsel to pick out how you got that information. This is very unnatural at first, but once you get the hang of it, you become a much more powerful witness.

   iv. This feels like cheating, but it is not. Attorneys are presumed to be competent (especially in our discussion today). Defense counsel may choose not to object to a hearsay statement for lots of reasons that benefit their client.

1. Maybe they don't disagree with the truth of the statement.
2. Maybe the statement isn't important enough to get into a fight about and risk irritating the judge – applying the hearsay rule to every single statement can make a trial take forever because you then have to bring in 40 witnesses who worked the case.
3. Maybe the person who made the statement has lots of other damning information and they don't want them on the stand.

v. With that said, attorneys all have different levels of aggressiveness and some know the rules better than others. A good attorney reads opposing counsel's objections and figures out how much they know and will push. Questions can then be asked right up to that line. This is trial strategy calculations that are going on behind the scenes during your testimony. If you're aware of what's going on, you can tailor you own testimony to take advantages of opposing counsel's knowledge and personality.

(5) Standards of proof, applicability of the rules of evidence

a. This refers to how much evidence is needed and what kind of evidence is admissible. As a witness, you have to know what the standard of proof and rules are for the hearing you're going into. You should ask the calling attorney questions to figure out what the rules are.

i. Shelter hearings
1. Probable cause – the most minimal standard. You need at least one witness testifying that something happened.
2. Hearsay is allowed. You don't need testimony from direct witnesses.
3. Example: The CPI testifies under oath that the neighbor told her that the child was abused. That's enough evidence to remove the child.
4. It's rare that a guardian would be called in a shelter hearing, except to shelter a second child of the same parent.

ii. Dependency trials
1. Preponderance of the evidence: 51%, or "more likely than not" or "it's probably the case that the parent abused, abandoned or neglected the child."
2. Hearsay is NOT allowed.
3. It's also rare that a guardian ad litem would testify in a dependency trial, except if the parent made an admission to you. For example, when case came in the Mother said to you "The Father beat me to a pulp a couple of times a month. He busted my lip, gave me black eyes and knocked me cold. One time, I was holding the baby when he pushed me to the floor and threw a coffee pot at me." By the time of trial, they have reconciled and now she says nothing happened.

iii. JR, CP, PH, visitation, MOP
1. Preponderance of the evidence: 51%, or "more likely than not" or "it's probably the case that XYZ."
2. Hearsay IS allowed.
3. The question here is what progress the parent has made and is it safe to return the child to the parent.

4. You may be called to testify if you saw or heard something about a parent or the trial that is relevant to the hearing.

iv. TPR Trials

1. Clear and convincing evidence: "without hesitation." The way I normally explain this is to say I once asked a case manager whether the mother's rights should be TPR'd and she told me she had to go home and think about it. That's hesitation.
2. Hearsay is NOT allowed.
3. Your testimony will fall into one of a few areas:
    a. Have the parent(s) remedied the problems that brought the children into care?
        i. Have they stopped using drugs, beating their spouse,
        j. becoming angry and/or engaging in the mental health treatment?
        ii. Presumably not that's why you are testifying in favor of tpr. How does their continuing problems impact the child. What is dangerous about their behavior?

b. What is the relationship between the child and the parent? Will the child be harmed if the parent is TPR'd? (Don't be afraid to say "yes". Most of the time the answer is "yes." Say that on direct examination and explain that it is very sad to sever this relationship but it's too dangerous for the child.)

c. What is the relationship between the child and the custodian? The court wants to know if the child is going to be in a stable and permanent home if they sever the parent's rights. BUT REMEMBER NOT A COMPARISON.

(6) Preparing for TPR testimony.

a. This is the trial that you will most likely be testifying at. It requires preparation and maybe even a change in your investigation.

i. If you haven't been to a parent/child visit, this is the time to start attending. On cross-examination by counsel for the parents you will be asked: Also, you will learn a lot about the relationship as I said earlier. If there is a no contact order say that it prevented you from seeing a visit.

ii. Have a conversation or two with the parent. Counsel for the parent: "Madam guardian, how can you possibly recommend TPR when you haven't even spoken with my client." Again, a good question. If you give mom and/or dad a call and they don't call you back, this is important information. Also, speaking to the parent early on in the case can remedy a common problem we have with having TPR's affirmed on appeal. If the department doesn't make reasonable efforts (give timely referrals) to the parent, that is a good defense to termination of parental rights. If we find out at trial (or worse on appeal) that these referrals were not made, we are seriously delaying permanency for a child. A lawyer in St. Petersburg once told me that he sends his volunteers to the case planning mediation (or at a similarly early time in the process) where the volunteer can speak with the parent. He asks the volunteer to talk to the parent and make sure they are getting their referrals. They ask questions like: "Has the case manager returned your calls" "What is his name and number?" Have you received a referral for parenting?" These questions serve two purposes: 1) we find out early on if the department is not doing its job and we can fix it; and 2) the volunteer is establishing a positive relationship with the parent. We have a G.M. in Miami who use to be a parent's attorney, he

always says that his clients who had a good relationship with the parents, had a better chance of being reunited with their children.

iii. A little digression: Make sure the parents' treating therapist get information other than that provided by the parent and follow up with treatment.

Explain traditional role of therapist and how difficult working in dependency can be
Need info from outside like petition, etc.
Then develop treatment plan
Issue progress reports

c. Preparing for trial.

i. Get a copy of the petition. Your lawyer will send you a list of questions. As you look at them, there may be some that you don't know the answer to. Talk to your lawyer to see if there are ways to find the answers.

ii. Make a timeline of the case. Sit down and write out a time line starting with when the children came into care to the present. Try to include placements, schools, services for the children as well as behaviors of the parents (mom's arrests, dad's positive urines). Don't worry, there will be holes in your time line, the supervisor and lawyer will help plug those in. There are two reasons to do this: 1) It helps you think about the case in a linear way and this will help the judge (and the court of appeal) understand the case easier. 2) You can use it at trial for refreshing your memory if you forget. You bring this to court INSTEAD of your file. DO NOT BRING YOUR FILE.

There is nothing worse than a witness sitting on the stand rifling through a huge file. You have a neon light over your head that says "NO ONE PREPARED ME FOR TRIAL" Instead, bring your time line and give it to your attorney. If you forget something, you will be given the time line to refresh your memory. If you get asked a question you don't understand, you say, "I don't remember." Your attorney will say: "Is there anything that will refresh your recollection?" You will reply: "Yes, my time line." Then you will be given the time to peruse and put down and then answer the question.

iii. Meet with your lawyer in person (if possible) to go over your testimony. This is very important. You must play act the testimony. Its not sufficient for you to write your answers out or say, "I will say this …" You must act it out so that your lawyer can hear the words you choose and correct those that are hearsay give always or are idiomatic like "I believe" when you mean "I know."

iv. Practice your testimony. You won't have it memorized and that's good. But you do want to have turns of phrase available to you at the ready. Practice a voice and a demeanor so that you won't be rattled on the stand.

b.Know the standard of proof and the question before the court and make sure your testimony adheres to it.

1. In TPR trials, the judge is supposed to make a decision "without hesitation." TPR trials are not the time to present all the pros and cons

of a case (really no trial is). This can CREATE hesitation in the judge where you didn't intend to do so, especially if the judge latches on to something you yourself didn't think was important. Distill your testimony down to only what you can say clearly and convincingly.

2. This means avoid words such as "I believe the children are three and five" You don't "believe" you "know the children are three and five." non-expert-opinion or personal commentary on the case. Sometimes, the experience of actually being on the stand and facing the parent, can cause you to feel bad and equivocate your recommendation. This is VERY FRUSTRATING FOR THE ATTORNEY, because he or she built their case around the strength of your original statements.

v. Present your affirmative position and let opposing worry about identifying the alternatives and weaknesses.
    1. Testimony is not an academic exercise. It's advocacy, like defending a thesis. If you feel your recommendation is correct, you do yourself a disservice by telegraphing the weaknesses in it to the opposing counsel during your testimony.
    2. There are times, however, when you earn credibility points by addressing weaknesses in the open. This is a strategy and should only be used when it doesn't undermine your main thesis.

vi. Don't brainstorm on the stand.
    1. When you are asked, "Is there anything else we could have done for this parent?" that is not the time to say, "Well, I read about an experimental treatment in Germany that supposedly had 100% success with this type of client." The question is always "what can you say without hesitation?" You yourself can't say without hesitation that this experimental treatment would work and now you've inserted a red herring into the case that the defense and judge will possibly latch onto with unintended consequences.

vii. Don't try to converse directly with the judge.
    1. I've seen witnesses go through their entire testimony and then at the end say, "Judge ,can I speak freely?" It's usually at that moment that they inadvertently undo their entire testimony.

        a. Trust the attorneys to know what type of information is and isn't relevant and persuasive. Remember we're assumed perfect attorneys here. If you have problems, train them on what questions to ask you BEFORE you get into the court room so that you can get feedback on what legal implications those statements might have. Then you won't need to talk directly to the judge.

(7)Strategies on cross examination

a.Know your weaknesses

viii. Never be surprised or let the attorney who called you be surprised by the limitations on your opinion. You should have responses scripted out in advance. Over time you will develop standard responses to standard questions.

ix. Never telegraph doubt: by having thought through your answers in advance, you appear confident and "without hesitation."

x. Never telegraph lack of consideration or appreciation for the weaknesses: you have to balance confidence without sounding cavalier. This takes practice.

xi. Not every weakness is fatal. Be prepared to explain why a certain weakness in the case does not undermine your entire opinion. Janga explanation.

b.Repeat your direct examination testimony as much as possible.

i.On cross examination, opposing counsel is trying to get you to admit to certain things. Stick to your talking points. If you answer every question, "As I said before…" then you win cross examination.

d. Remember your calling attorney will get to redirect you afterwards.
   i. This means they get to "clean up" whatever damage may have happened during your cross examination. This is usually often the time you get to explain yes/no answers that opposing counsel forced you to give without explanation on cross.

e. Listen to the question and consider why it's being asked. This takes experience and an understanding of the law. Every question is doing one or more of the following:

   i. *Proving a defense.* Always ask the calling attorney, "what are the possible defenses to this case?" By understanding those, you can "hear" the real reason a question is being asked and you can answer with that understanding and avoid inadvertently undermining your position.

   ii. *Showing flaws in your work on the case.* It doesn't matter if you perform 100% to accepted standard of practice, the opposing counsel will invent something you did not do and ask you why you did not do it. Be ready to address why certain acts or information would not have likely changed your opinion.

   iii. *Showing you have an incorrect understanding of the facts.* This is usually done through hypothetical questions. Opposing counsel will give you a scenario very similar to the case as you understand it, but change various facts to reflect their theory of the evidence. Take time to think about the full implications of whatever changes they make, and be sure to point out any missing information that you would need before changing your opinion.

iv. *Showing some bias or motive you have to take the position you've taken.* Opposing counsel may seek to show you have personal investment in the case. This will usually be in the form of trying to show that you prefer the custodian over the mother.

(8) Strategies in Court.

a. Basic do's and don'ts.

1. Appear and behave professionally. This applies both on the witness stand and off.

2. Before the hearing, make sure you know where you will be sitting when you testify and the path you must take to get there. This enables you to walk directly to that spot in a forthright manner and be sworn in.

3. Dress professionally. Studies have shown that blue for men and black for women are the most appropriate colors for "looking believable." Siding on the conservative side is best, avoid flashy colors and loud jewelry.

4. Remember you must answer the questions out loud, nodding does not get recorded. (By the same token, remember that when you are not testifying to be very quiet in conversation with your attorney. The microphones in the courtroom may pick up your conversation, especially at non-trial hearings where everyone is talking).

5. Figure out what you are going to do with your hands. If seated, they should sit on your lap. If standing, be careful about putting them in pockets because you might jiggle your keys. Hands behind the back or in prayer position may be best.

6. If you didn't hear the question, don't understand it or just need a moment to think, ask the attorney to repeat the question. After all, its scary to testify. Your heart may be beating a hundred miles per hour. Attorney: "State your name for the record." You: (Heart beating so loud you can't think) "I'm sorry can you repeat the question." BOOM

7. If you don't understand the question, ask the attorney to repeat or simply tell them "I don't understand the question." Do not help them (unless it's on direct examination). Defense attorney: "Madam guardian, does Johnny go to Dr. A for therapy?" You know that Johnny sees Dr. B. DON'T SAY: "No, Johnny goes to Dr. B." That is being helpful. Answer: "No."

8. If you are asked a question, and don't remember the answer, say that. "I don't remember." This is where your time line can be used.

9. If there is an objection, stop talking. The court or your lawyer will tell you if you can answer the question.

10. Avoid being combative. Let the attorneys get as nasty as they want. They're more than likely trying to "bait you." You stay cool and answer the questions. Go to the calm voice you practiced. Remember to ask your attorney to cross-examine you as part of your preparation.

11. As part of your preparation, you should figure out the building blocks of your position. Think about and discuss with your attorney what blocks, if removed from the building, would cause the building to fall. Do not be afraid of that testimony.

12. Avoid looking at your attorney when answering questions. This looks like you are asking help.

13. Most of all, tell the truth, avoid the temptation to embellish the truth even a little bit. It's not necessary and you will lose credibility if caught.

(9) How to improve

f. Every time you testify, get feedback afterwards from the calling attorney. Questions to ask:
    i. What did you hear my testimony to be? What did the judge hear my testimony to be?
    ii. How did the judge use my testimony?
    iii. Were there any inconsistencies or weaknesses in my testimony?
    iv. Did opposing counsel ask me a question that I did not understand the purpose of?
    v. Did I create any unintended distractions?
    vi. How was my demeanor? (This can be very difficult to hear the answer to. Some people, for example, always look guilty even when they're not. Some people always sound unsure, even when they're committed. Attorneys know which witnesses are good on the stand and which aren't, and we discuss this among ourselves.)
    vii. Can I get a copy of the transcript of my testimony? If there is an appeal, there will be a transcript. Ask your attorney if you can make a copy of your testimony.

g. Demand your calling attorney spend time prepping you. If you are not comfortable with the preparation you received, ask to speak with their supervisor.