

# **In Re Pena Teaching Notes**

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## Introduction

The goal of this workshop is to assist social workers and lawyers who work on child dependency cases in developing the skills they need to work together effectively. The exercises and problems focus on three important and inter-related competencies that both social workers and lawyers should possess: (1) the ability to *develop case theory and case planning strategies* in a collaborative and interdisciplinary manner; (2) the ability to work together to *prepare the witness to present persuasive argument or testimony*; and (3) the ability to *examine witnesses effectively (for attorneys) and to testify effectively (for social workers)*.

The workshop is designed as a 1.5-day program. A lot is covered, and it is intense and exhausting. In addition, some participants may be resistant to the idea of being critiqued, or just plain nervous about it. There are many things teachers can do over the course of the workshop that will improve the likelihood that the participants will get the most out of it. Here are just a few that can be particularly helpful:

- Emphasize the importance of dependency work and the importance of every participant's role. Practitioners in this area are often seen as less "serious" professionals in spite of the importance of the work they do. A feeling of pride in their profession can only increase the commitment of dependency lawyers and social workers to skills improvement and learning to work together in a more collaborative manner.
- Embrace the intensity of program. Show the participants that you are looking forward to the challenge of it and have fun; the participants will follow your lead.
- Let participants know that "What happens here, stays here." They should feel comfortable enough to take risks, make mistakes, and learn from them.
- Let participants know that our goal is that by the end of the program they leave somewhere different from where they started with respect to both skills development and understanding roles. Point out that this will directly benefit their clients.
- Some participants may feel skeptical about the trial skills portion of the workshop because there are many aspects of the case file that will be different from the practice they are used to, or because they feel that judges in their jurisdiction would never tolerate the imposition of such skills in their courtroom. Encourage them to suspend that skepticism by emphasizing that the skills they learn will be usable in any context, that the vast majority of judges who have been involved with these programs assert they prefer lawyers and social workers who utilize "best practices" in the courtroom, and by suspending your own skepticism and leading by example.

- Begin each workshop with a brief overview of what will happen in the upcoming exercise, what skills will be developed, and why those skills are important to **both** lawyers and social workers.

### **Statutory Grounds for Placement in Foster Care**

In order to remove Eva and place her in out-of-home foster care, DFS must show that there would be substantial danger to Eva's health, safety or protection in the care of Ms. Pena, **and** there are no reasonable means to protect her without removal. The burden is on DFS to prove those elements by **clear and convincing** evidence.

Children's Code of Nita (CCN), Section 2514 (WIC 361(c)(1))

- (A) GENERAL RULE — When a child has been detained from a parent pursuant to the filing of a dependency petition and having been found to be a person described by Section 2513 of the CCN (WIC 300), the court must order the child released back into the parent's custody unless the petitioner makes a showing by **clear and convincing evidence** that there would be a **substantial danger** to the child's physical health, safety, protection, or physical or emotional well-being if the child were returned home, **AND** there are no **reasonable means** to protect the child without removing the minor from the parent's physical custody.

Eva's lawyers are supporting a return of Eva to Ms. Pena. That point will be made to participants explicitly when they receive their materials.

DFS will try to use the testimony of Emile Ryan to show that there is a substantial danger to Eva because she was left alone for a substantial amount of time, and because of Ms. Pena's drug use. DFS should also try to use Eva's disclosure to Kris Forrest about Ms. Pena's boyfriend to show substantial danger. DFS may attempt to use Ms. Pena's statement about moving out of state with Eva to show likelihood of fleeing, though this claim is clearly weaker. Ms. Pena, and Eva, will try to use the testimony of Jaime Cruz and Kris Forrest to show that Ms. Pena, while perhaps guilty of poor judgment, does not present a substantial risk to Eva. Ms. Pena and Eva can also elicit evidence on whether there are other means to protect Eva without separating her from her mother.

## **Problems**

### **1) Case Theory**

The theory of the case is a statement that binds together the law and facts of your case in a manner most likely to convince a decision-maker to adopt your client's position. It forms the legal basis for the strategies behind nearly all actions in and outside of court on a case, including negotiations, settlement conferences, motions, witness interviews, and trials. A persuasive case theory is:

- Logical, in that it is based on undisputed or provable facts which reinforce and do not contradict each other.
- Legal, in that it is a position to which the client is legally entitled.
- Credible, in that it comports with common sense as much as possible, does not involve unduly harsh judgments, and accounts for unfriendly facts

Unlike social workers who are trained to collect all factual information and make the most objective assessment possible, lawyers must use all available information to develop a theory which will advance their client's objective. It is therefore necessary to develop a case theory that is logical, legal and credible. In dependency cases, a case theory will much more likely meet these criteria if it is formed in a collaborative manner between a lawyer and a social worker. The social worker has a distinctive area of expertise that can help determine which facts are most significant in a case; the social worker will often be testifying, making her understanding of the theory behind the questions helpful to her testimony; and, the social worker may very well carry out her interviews or other interactions with respondents and children in a different manner if she knows what legal theory the lawyer will be using. The *learning objectives* of the Case Theory Workshop are to improve participants' ability to analyze facts and law in the development of a case theory, and to illustrate the benefits of collaboration between social workers and lawyers in developing an effective and coherent case theory.

For this workshop, participants will break out into small groups. Each group will be comprised of lawyers and social workers from the same "team" (Agency Lawyer/Emile Ryan; Ms. Peña's Lawyer/Jaime Cruz; or Eva's Lawyer/Kris Forrest). Because this workshop will require keeping track of participants' input, it makes sense to have one trainer lead the discussion, while a second trainer writes comments down on a large board at the front of the room. Alternatively, the two trainers can alternate leading the discussion in regard to certain issues or parts of the exercise. The trainers in the room should talk among themselves and decide how to best divide up the teaching roles. Each team will have the same ratio of lawyers to social workers.

Trainers will lead a brief breakdown of the relevant statute, highlighting each element. This will almost certainly be a new experience for the social workers. After the elements are established, the trainers should have the lawyers and social workers list all the facts that are good for their team, and all the facts that are bad. Social workers should be

especially encouraged to participate at this stage so that lawyers see how social work expertise can highlight how a particular fact is better or worse than a lawyer may initially perceive. Participants will then identify the three best and three worst facts and attempt to develop a theory of the case that accounts for those facts. Finally, trainers should lead participants in a discussion of how to establish the facts necessary to support the theory of the case – in other words, which witnesses can testify to which facts, and which documents should be entered into evidence – as well as a discussion of how to structure the direct and cross examinations strategically.

## ***2) Effective and Ethical Witness Preparation***

Witness preparation is a crucial time for effective collaboration between lawyers and the social workers they will call as witnesses – the presentation of persuasive testimony at a trial requires it. In addition, because of different roles and ethical mandates, challenging ethical dilemmas can arise as lawyers assess what testimony will be most persuasive, and social workers assess what testimony best conforms to their professional responsibilities. For this workshop, participants will remain in the same small groups that they were in for Workshop #1. The ***learning objectives*** of the Witness Preparation Workshop are to provide lawyer and social worker participants with an understanding of basic principles of witness preparation, and to explore some of these ethical tensions.

The interactive workshop will begin with a facilitated discussion of the key aspects of good witness preparation, focusing on what information should be exchanged between the lawyer and social worker regarding courtroom procedures, practical concerns and testimony content. Trainers should lead the discussion, and be sure to elicit suggestions from lawyers and social workers on what information they should exchange, including but not limited to the following:

- Has the social worker testified before?
- Is the social worker familiar with the layout of the courtroom?
- Does the social worker know how to address the various players in the courtroom?
- Does the social worker know how to get to court?
- Do the lawyer and social worker know what time they should meet in court?
- What is the theory of the case?
- What questions should the lawyer ask during testimony?
  - How will the lawyer introduce the social worker?
  - What are the best questions with which to start and end the substantive testimony?
  - What questions should be asked to minimize bad facts?
  - What details should be elicited during the testimony?
- How will the social worker answer each question?
- How should the questions and answers be *structured* to ensure the testimony is clear and persuasive?

- How should the questions and answers be *paced* to ensure the testimony is clear and persuasive?
- Are there any areas about which the lawyer should not ask?
- What questions are likely to be asked on cross examination?
- How should the social worker handle those questions?
- What should the social worker do when she hears an objection?

### 3) *Trial Skills*

At hearings, lawyers and social workers must work together to present testimony and other evidence effectively. For the trial skills workshop participants will again break out into small groups, with at least three lawyers (a DFS lawyer, a lawyer for Maria Pena, and a lawyers for Eva Pena) and three social workers (Emile Ryan, Jaime Cruz, and Dris Forrest) in each group. Participants will keep the same role they had during the Case Theory Workshop. At the beginning of the session, participants should be given an opportunity for 15 to 20 minutes to further hone their examinations. The ***learning objectives*** of this workshop are to improve the witness examination skills of the lawyers, and the testifying skills of the social workers.

In order for this workshop to work effectively, trainers should follow the NITA method of critiquing. The general format is as follows:

- For each examination, one trainer should serve as judge and a second trainer should be timekeeper. The judge will rule on all objections; the timekeeper will keep time.
- Allow the lawyer and witness to complete the examination. Do not interrupt, unless absolutely necessary.
- Stop the examination at the end of the allotted time period, even if the examiner has more questions to ask.
- At the end of each individual examination, each trainer should offer 1 or 2 critiques of the lawyer who conducted the examination and the social worker who testified.
- Each critique should begin with a short and pointed ***headline*** of what topic is being addressed (see the last four pages of the Teaching Notes for a list of potential topics to critique on direct examination skills, cross examination skills, and testifying skills).
- The critiquer should then ***playback*** what the participant said as precisely as possible. It is obviously crucial to take very good notes during the examination in order to playback what was said accurately. The accuracy of the playback makes a huge difference in the effectiveness of the critique.
- The critiquer should then give a specific example, or ***prescription***, of how to do it better next time.



- Finally, the critiquer should give a *rationale* for why the prescribed example is more effective.

In general, make sure that the topic of the critique is one that the person can fix, that the critique is at the participant's level, and that it works on a skill that was central to the participant's performance. If an aspect of a participant's performance was especially good, and provides a good teaching mechanism, it is entirely appropriate to go through a critique of that aspect, without the prescription segment.

Following are outlines of the examinations of each witness:

#### A – Emile Ryan

The general purpose of the direct examination is to establish the elements required to justify a placement of Eva away from her mother. The examiner will attempt to establish Ryan's expertise and basis of knowledge and should also cover the details of Mr. Lapier's statements; the interview with Eva; the condition of the Pena apartment (including the drug paraphernalia); the interview of Ms. Pena; Ryan's observations of Ms. Pena; Ms. Pena's "admission" to the police; her statement about taking Eva out of state; and Ms. Pena's arrest and plea.

On cross examination, the examiner may wish to establish Ms. Pena's generally cooperative behavior; introduce into evidence the note that was left with Ms. Gonzalez' number; and highlight actions not taken by Ryan that were taken by Jaime Cruz and/or Kris Forrest.

#### B – Jaime Cruz

The lawyer conducting the direct examination of Cruz should establish Ms. Pena's history and use it to put the incident in this case in context and show Ms. Pena in a more positive light. Cruz can also be used to establish Ms. Pena's version of the incident. Ms. Pena's willingness to admit use and get treatment might be emphasized. The negative drug tests, especially the one after the incident, should also be highlighted. Ms. Pena's lawyer may consider trying to qualify Cruz as an expert witness to get out Cruz' opinion that Ms. Pena is not an "addict."

A good cross examination of Cruz will go over the repeated relapses of Ms. Pena, and her need to use cocaine when under stress. Indeed, the cross should highlight any aspects of Cruz' report that reflect negatively on Ms. Pena. The cross might also try to establish that Cruz seems to have a very strong personal investment in Ms. Pena's success that might be affecting his objectivity.

#### C – Kris Forrest

The direct examination of Forrest should go through aspects of what she learned from Eva during the interview that support a return to Ms. Pena, including: Eva's well-

articulated wishes and a lack of undue influence from her mother (Forrest may need to be qualified as an expert to testify to the latter); Eva's unhappiness in foster care; and her account of the incident. The examiner should consider whether to bring out the comment about Ms. Pena's boyfriend in order to diffuse its use on cross. Aspects of the collateral contacts with the school and pediatrician that support a return should also be covered.

A cross examiner will want to bring out Eva's love for her mother as a possible motivation to minimize the incident, as well as Eva's disturbing comment about Ms. Pena's boyfriend engaging in domestic violence and owning a gun. A cross should also highlight any other aspects of Eva's comments which reflect poorly on Ms. Pena.

## **A Non-exhaustive List of Critiques Specific to Direct Examination<sup>1</sup>**

- Generally, do not use leading questions. May use leading questions if it is preliminary or foundational.
- Avoid asking leading questions by using "who, what, where, why, when, how, explain, and describe" type questions. Try to vary those questions to maintain an interesting flow to the examination.
- Avoid "what happened next" and "then what happened" questions. These questions call for a narrative and lose the conversational aspects of the examination.
- Use short questions to help control the flow of information.
- Slow down the action on important segments.
- If the witness appears to be nervous, try to start with simple questions and comfortable areas aimed at putting the witness at ease.
- Use "loop-backs" - Use a portion of the witness's answer for your next question.
- Avoid compound questions.
- Accredit the witness.
- Set the scene.
- Introduce the witness - Instead of "State your name for the record", how about, "Would you please introduce yourself to the jury" or "Please tell us your name."
- Use language we all can understand - Avoid legalese and words such as proceeding, subsequent, prior, observe, occasion, etc.
- Define terms used by the witness (particularly experts) which the jury may not understand.
- Use headnotes to help organization of the direct - This is announcing to the Witness and the Trier of fact the area about which you are going to ask questions. For example, "Mr. Brier, I now would like to talk with you about what you saw when Walter Watkins was in the liquor store."
- Avoid nervous fillers such as "OK", "Ah-huh," "I see" and repeating the last few words of a witness's answer.
- Use demonstrations in the courtroom to help the Trier of fact with setting the scene, the action, etc.
- Refresh recollection properly.

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<sup>1</sup> Taken, with very minor alterations, from NITA Faculty Training Materials, in NITA's Guide for Teaching Advocacy Skills, James H. Seckinger and Mark S. Caldwell (NITA 1993).

## **A Non-exhaustive List of Critiques Specific to Cross Examination**<sup>2</sup>

- Control the witness by leading questions.
- Condition the witness to give just yes or no answers by starting with questions which make it easy for the witness to say yes or no.
- Use short questions - One point per question.
- Elicit facts, not conclusions.
- Only ask a question where you don't know the answer if you don't care what the answer will be and can deal with it no matter what it is.
- Avoid long convoluted and argumentative questions.
- Do not argue with a witness.
- Develop impact areas - An area where you know will make some points. Turn one question into several questions to assist making your point with impact.
- Use head notes.
- Rein in a talkative or unresponsive witness (a lesson in and of itself).
- A good cross examiner will have listened to specific words used by the witness during direct. Use these words to your benefit during cross.
- Cross examination need not be "cross" or "angry."
- Impeach properly.
- Avoid the use of tag lines at the end of your cross-examination question. For instance, make the statement without using, "didn't you," "weren't you," "Isn't that correct", etc.
- Do not interrupt the unresponsive witness. Look the witness in the eye and ask the question again.

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<sup>2</sup> Also taken, again with very minor alterations, from NITA Faculty Training Materials, in NITA's Guide for Teaching Advocacy Skills, James H. Seckinger and Mark S. Caldwell (NITA 1993).

### **A Non-exhaustive List of Critiques Specific to Testifying**<sup>3</sup>

- Tell the truth.
- When answering questions, look at the person asking them or at the judge or jury.
- Do not adjust your testimony to other testimony you may have heard or been told about.
- Do not use technical language that a non-social worker is unlikely to understand.
- Speak clearly.
- Only try to answer a question if you are sure you understand it. Otherwise, ask that the question be re-phrased.
- If the question is asked in a way that requires a “yes” or “no” answer but cannot be answered with a “yes” or “no,” say so.
- Be courteous at all times, even if the person questioning you is not.
- Avoid answers that box yourself in, such as “nothing else happened” or “she didn’t say anything else.”
- When someone objects, stop speaking right away, and wait until the judge tells you that you may continue.
- Do not argue with the judge or other attorneys.
- Listen to the question.
- Keep your answers concise.
- Answer in a calm, deliberate voice.
- Take time to consider a question before you answer it.
- Ask for clarification if you do not understand a term used in the question.
- If an attorney asks many questions at once, ask which question she would like answered first.
- Use the terms “approximately,” “around” or “about” unless you have exact knowledge.

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<sup>3</sup> Adapted from Donna M. Pence’s training workshop for social workers on “Preparing and Presenting Effective Testimony.”