

Question at Trial: What is the Purpose of Protocols?

Legal Eagles – You’re on the stand and the prosecutor asks, “What is the purpose of having protocols?”

Before answering, you understand that in the courtroom a protocol can either be your friend or your nemesis. Established protocols are going to be easily defined and easily applied, and also easy for a good defense lawyer to understand and apply critically to your work product.

I have written so many times in past Legal Letters to **know the established standards and protocols!** But what does that really mean anyway? It’s kind of like saying **eat your vegetables!** which when standing alone (as all parents of small children know) may not be such a satisfying statement, let alone a persuasive one.

This topic of protocols can be compared to understanding statutes (a/k/a laws passed by your state’s legislature). When I read a statute, I also want to understand the public policy behind it, including the purpose for which it was passed by our legislators in the first place. When a lawyer understands the public policy behind a statute that has application to a particular case then she can, by the use of relevant analogies, bring in other statutes or public policies that are helpful to winning the case.

The same with witnesses who have standards and protocols that are specific to their professions. Once they truly understand the **purpose** of protocols, then the groundwork is laid for performing their jobs responsibly and credibly, and with consistency. It need not be dwelled upon too long that this translates well to the witness stand.

Of course, the inverse is true. Without understanding the protocols **and** the purpose behind these protocols, a person is very capable of being overwhelmed and impeached on the witness stand, in a very dispiriting way.

When preparing a witness who must follow standards and protocols for trial, the lawyer can go through checklists. With protocols, there can be general checklists and specific checklists. An example of a general checklist, set out below, can be seen as the more universal checklists that have wide application and which can be applied equally to protocols for detectives and to protocols for forensic interviewers.

On the other hand, specific protocol checklists zero in on a specific profession. That is why a prepared lawyer who preps a witness will interview the witness prior to trial in order to fully understand the specific protocols related to the witness’s particular profession.

(As a side note, your state or county may actually have specific protocols in place. Or it may use some national model. You can do some research and find out.)

Many times, the witnesses have not even thought of the purposes – general or specific -- behind protocols. That’s called failing to see the forest for the trees. I would suggest that once the purposes of protocols can fall off the tip of your tongue, then the work you do in the future cannot help but improve.

The balance of this Legal Letter will discuss protocols in their **general sense**. But one more preliminary note: In my opinion (which can and will vary from lawyer to lawyer), it is more important to describe the reasons behind protocols at trial in their **common sense** rather than their **scientific or technical sense**.

This is because I know that these protocols as described are going to be provided to jurors, not university professors.

By saying this, I am not suggesting this needs to be expressed in stripped down, elementary forms. But I am suggesting that this discussion should be in terms of basic truths, in the sense that a juror might conclude that they could have application to how a forensic interviewer conducts an interview just as to how an umpire might call balls and strikes.

But be aware! On cross-examination, you may be challenged to recite the scientific and/or technical reasons for protocols. If so, you'll be ready, and be able to define and discuss the protocols in technical terms, before explaining it in plain English. See "How to Be A SuperWitness" article, Rule No. 23: ***"Plain English. Plain English. Plain English. If you have to use professional jargon, say it and then define it in Plain English."***

On to protocols:

1. A protocol sets a clear framework from which to work. It is easy to imagine a juror on a child molestation case thinking to himself that the acts and circumstances behind an alleged child molestation, and ultimately the initial disclosure, and then the investigation, and then the collective fallout from all of the above, is a series of chaotic events. An established protocol, on the other hand, is a tried and true method of providing a measured response and measured plan to address these allegations, to commence the investigations, and to assist the affected individuals after a disclosure occurs.

2. An established and reliable protocol, when applied professionally, tends to lead to a reliable result. The strength of this reason is that in the area of child molestation, there are a variety of professionals who follow standards and protocols. Law enforcement has its protocols. Forensic interviewers have theirs. Forensic evaluators theirs, as do medical professionals and CPS professionals. I am not saying that a lack of any evident protocol, or protocols that are not properly followed, will cause the entire ship to sink. I am saying that protocols that are not understood, are not properly applied, or are simply not followed are prime areas that are ripe for attacks: credibility attacks; attacks on the integrity of the process; and attacks on the organizations and people who respond to allegations of child abuse.

An example is the 2006 case, Tyler v. State, Georgia Court of Appeals (279 Ga. App. 809). There, the Defendant was convicted for child molestation, and appealed because he argued the forensic interview was not conducted according to established standards and protocols. The Defendant also argued that his defense lawyer provided ineffective legal assistance because he did not hire an expert at trial to critique the forensic interview.

Among the "specific protocol" criticisms regarding the forensic interview that were raised on appeal were:

- An improper sequence of questioning;
- The use of repetitive and leading questions;
- The failure to ask follow up questions that would have clarified the alleged ambiguities in the victim's answers; and

- The forensic interviewer, a detective, appeared to have a preconceived bias toward a finding of molestation.

However, the appeal failed and the conviction was affirmed, based upon the Court of Appeals' finding that the defense lawyer had experience in trying child molestation cases, had seen forensic interview tapes before, and cross-examined the detective regarding his forensic interviewing techniques. Thus, according to the Court of Appeals, it could not be demonstrated that the outcome would have been different if the defense had called an expert witness to attack the detective's techniques.

But don't rely on defense attorneys to fail to hire an expert to attack a forensic interviewer's techniques. And don't rely on the legal finding in a random court of appeals opinion that "***it could not be demonstrated that the outcome would have been different if the defense had called an expert witness to attack the detective's techniques.***" Instead, work under the assumption that a forensic interview, or any important work product, can and will be critiqued by someone who is going to be tendered as an expert.

3. An established protocol also provides a clear boundary between your professional responsibilities and those of other MDT members.

One defense attack that stands out when reading the appellate cases involving child molestation trials is the one that suggests a particular professional overstepped the boundaries of his role. At that point, the argument goes, the person's objectivity and quest for the truth ended and his advocacy or bias toward a particular result began.

We have discussed this topic in past Legal Letters. ***Know your roles.*** Know how to precisely explain to jurors why you are performing those roles, which while different from other MDT members does not mean that they have to be in conflict. Instead, they are seen as distinct pieces of the puzzle which cannot be put together when a person such as a forensic interviewer has, as an example, somehow managed to overreach by performing something resembling a therapeutic function. Established "general statements" regarding protocols can assist in establishing these reasonable boundaries.

Clearly there are other general statements to be made regarding protocols. It's worth a healthy discussion at an MDT meeting. Protocols promote reliability. Reliable evidence in the courtroom leads to credibility. Credibility wins cases, and that means justice.

Best regards.

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